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Supreme Court, U.S.
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IN THE
Supreme Court of the United States

JAMES A. TRAFICANT, JR.

Petitioner

v.

UNITED STATES OF AMERICA

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is a member of the House of Representatives twice placed in jeopardy in violation of the Fifth Amendment to the United States Constitution when prosecuted by both the House Ethics Committee and Justice Department for the same conduct?

2. Did the Juror Selection Plan for the Eastern Division; Northern District of Ohio gives an unfair advantage to the government thereby denying the Petitioner the right to be tried by a jury of his peers?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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In The
Supreme Court for the United States

UNITED STATES OF AMERICA

Respondent,

v.

JAMES A. TRAFICANT, JR.

Petitioner.

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner-Appellant James A. Traficant, Jr. asks that this Court issue a Writ of Certiorari to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the United States court of appeals appears at Appendix A to the petition and is reported at *U.S. v. Traficant*, 368 F.3d 646 (6th Cir. 2004). The opinion of the United States district court appears at Appendix B and is reported at *U.S. v. Traficant*, 209 F.Supp.2d 764 (N.D.Ohio 2002).

JURISDICTION

The United States Court of Appeals for the Sixth Circuit this case on May 19, 2004. No petition for rehearing was filed. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The questions presented implicate the following provisions of the United States Constitution:

Article I, §5

Each House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two thirds, expel a member.

Amend. V

No person shall be… subject for the same offense to be twice put in jeopardy of life or limb…. nor be deprived of life, liberty, or property, without due process of law.

Amend VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed….

STATUTORY PROVISIONS INVOLVED

There are no statutory provisions at issue in this case.

STATEMENT OF THE CASE

A. PROCEEDINGS BELOW

On May 4, 2001 a federal grand jury returned a ten-count indictment against Petitioner James A. Traficant Jr., a Member of the United States House of Representatives. A superseding indictment was returned on October 26, 2001 alleging four counts of conspiracy to violate the Federal Bribery Statute, 18 U.S.C. §201(c); one count of violating the Federal Bribery Statute, 18 U.S.C. §201(c)(1)(B); one count of obstruction of justice, 18 U.S.C. §1503; one count of conspiracy to defraud the United States, 18 U.S.C. §371; two counts of filing false tax returns, 26 U.S.C. §7206(1); and violation of the RICO Act, 18 U.S.C. §1962(c).

On April 11, 2002, a jury in the Eastern Division of the United States District Court for the Northern District of Ohio found Petitioner guilty of counts one through ten of the superseding indictment. On April 22, 2002, Petitioner filed a motion for a new trial arguing that (1) the district court erred by preventing Russell Saadey, Jr. from testifying at trial; (2) the district court erred by not permitting Linda Kovachik to testify to certain statements at trial; (3) the district court erred by depriving him of a fair trial by making certain remarks with the jury present; and (4) he discovered new evidence that is material and would probably result in a different verdict at a new trial.

A Supplemental Motion for New Trial was filed simultaneously on Petitioner's behalf challenging the validity of the Juror Selection Plan of the Northern District of Ohio on the basis of geographic under-representation. The district court denied both motions on June 25, 2002. *U.S. v. Traficant*, 209 F.Supp.2d 764 (N.D.Ohio 2002). An appeal was timely filed to the United States Court of Appeals for the Sixth Circuit.

On appeal, Petitioner argued that: (1) his sentencing by the district court, following his expulsion from the House of Representatives, overrode his Fifth Amendment protection against Double Jeopardy; and (2) his jury was selected in a manner at odds with his Fifth and Sixth Amendment rights because of the disproportionate chance that the petit jury would lack residents of his congressional district.

On May 19, 2004 the Sixth Circuit denied Petitioner's appeal. The court held that that the Double Jeopardy Clause did not preclude a member of the U.S. House of Representatives from being disciplined by Congress and being convicted criminally for the same conduct because the sentencing did not result in a new and separate jeopardy and that Petitioner had waived his right to challenge the jury selection process used in his criminal prosecution. It is from this decision that Petitioner seeks review

B. FACTUAL BACKGROUND

1. The Jury Plan

In 1997, the Northern District of Ohio adopted a Jury Selection Plan. The plan was amended in June of 2001 and the Sixth Circuit Judicial Council approved the Amended Jury Selection Plan on June 24, 2001. (See Jury Selection Plan for the Northern District of Ohio, Appendix C.) The plan recognizes three locations for holding court in the Eastern Division- Cleveland, Akron and Youngstown. Under the plan, the Eastern District is divided into three jury pools for each respective location. For instance, the counties of Columbiana, Mahoning and Trumbull constitute the jury pool for Youngstown. Significantly, under this plan the residents of these counties are expressly excluded from inclusion in the jury pools for the courts sitting in Cleveland and Akron.

Under the Local Rules for the Northern District of Ohio, all criminal cases in the Eastern Division are filed in Cleveland. Judges are assigned by random draw without regard to location. (See Local Rule 57.10, Rules of the Northern District of Ohio, Appendix D.) At the time

Petitioner's indictment was returned, there were seven active district judges in Cleveland, one in Akron and one in Youngstown.

Therefore, Petitioner had a 12.5% chance to draw a judge from Youngstown and the Government had an 87.5% chance of drawing a judge from Cleveland or Akron. What this amounts to is 8 to 1 odds against Petitioner having a jury from the areas most familiar with him. Thus the Jury Selection Plan, seemingly neutral on its face, gave an advantage to the Government.

Before his trial began, Appellant raised the issue of whether the pool of jurors available in his case was appropriate. He noted that because the jury pool would necessarily exclude jurors from Trumbull, Mahoning and Columbiana counties, the Government would have "an unfair advantage." (Motion for Inclusion of All Counties in the Northern District of Ohio in the Voir Dire, Appendix E.) The District Judge denied the motion for two reasons. First, she found the motion untimely in view of her order setting a January 9, 2002 deadline for filing pretrial motions and, second, she found the plan did not violate his rights. (See Order Denying Defendant's Motion for Inclusion, Appendix F.)

2. Prosecution by the House of Representatives

Following his conviction, a Subcommittee of the House of Representatives returned a Statement of Alleged Violations against the Petitioner. The Statement was predicated on the same counts set forth in the superseding indictment in this case.

Next, the Ethics Committee's Adjudicative Subcommittee conducted hearings in regard to Appellant and on July 17, 2002, this Subcommittee found him guilty on nine of the ten counts. The only count upon which the Subcommittee did not find a violation dealt with those matters upon which the jury in this case refused to make a finding of guilty.

The Subcommittee proceedings were carried out pursuant to Rules Governing the Committee on Standards of Official Conduct. (See Appendix G.) These Rules include, *inter alia*, provisions which assure the person accused the right to have his case heard upon due notice; the right to counsel; the right to testify before the subcommittee under oath; the right to request a Bill of Particulars; the right to file a Motion to Dismiss; the right to subpoena records; and the right to have the Rules of Evidence enforced by the Chairman of the Subcommittee.

Guilt would be determined by clear and convincing evidence, and could be based upon witness testimony, interrogatories, depositions or affidavits. The Rules provide for a variety of specific sanctions, but also include "(a) any other sanction determined by the Committee to be appropriate." Rule 25, Rules – Committee on Standards of Official Conduct. It is also provided that the Committee may refer matters that come before it to appropriate federal and state authorities. Rule 29, Rules- Committee on Standards of Official Conduct.

On July 24, 2002, citing the Statement of Alleged Violations forwarded by the Ethics Committee, the House expelled him. On July 29, 2002, Appellant moved to bar sentencing in the District Court on the grounds that such a sentencing would result in an additional punishment violating his rights guaranteed under the Fifth Amendment not to be punished more than once for the same offense. (Motion to Bar Sentencing, Appendix H.) The motion was denied and a sentence of eight years in prison and half a million dollars in fines was imposed.

REASONS FOR GRANTING THE WRIT

I. WHETHER THE PETITIONER, A FORMER MEMBER OF THE HOUSE OF REPRESENTATIVES, WAS SUBJECTED TO DOUBLE JEOPARDY IN VIOLATION THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION IS AN IMPORTATN MATTER OF FEDERAL LAW AND SHOULD BE SETTLED BY THIS COURT.

Petitioner was put in jeopardy twice for the same conduct in violation of the Fifth Amendment to the United States Constitution. The Sixth Circuit Court of Appeals refused to find double jeopardy and concluded that such a result would violate the constitutional separation of powers because it would create a situation in which Congress could shield its members from criminal prosecution by the Executive Branch. This decision is tantamount to a loophole to the constitutional prohibition against double jeopardy.

A. The House of Representatives Has the Power to Imprison its Members.

There is no question that Petitioner was prosecuted and sanctioned twice by the federal government for the same conduct, once by the executive branch and a second by the legislative branch. Both carried the threat of imprisonment.

Contrary to the findings of the appellate court, the power of Congress to imprison its members is not mere dicta. In *Kilbourne v. Thompson*, 103 U.S. 168 (1880) this Court affirmatively held that the House of Representatives had the power to imprison its members for a violation of an order. *Id.* at 189-190. The power of Congress to imprison has *never* been repudiated.

B. A Violation of the Separation of Powers Does Not Excuse Double Jeopardy.

The Fifth Amendment as well as the remaining original ten amendments to the United States Constitution imparts individual rights upon citizens. The Bill of Rights "curtail and restrict the general powers granted to the Executive, Legislative, and Judicial Branches" of the federal government defined in the original constitutional articles. *New York Times Co. v. United States,* 403 U.S. 713, 716, 91 S.Ct. 2140, 2142-2143, 29 L.Ed.2d 822 (1971) *(per curiam)* (Black, J., concurring) (emphasis deleted).

"The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 638, 63 S.Ct. 1178, 1185, 87 L.Ed. 1628 (1943).

If as the Sixth Circuit found, the application of the Fifth Amendment in Petitioner's case violates the separation of powers, this court must undertake a review to maintain the integrity of individual freedom. If both the Legislative and Executive branches of our government currently hold the power to prosecute and imprison, the cost of this perversion in the separation of powers should not be borne by the petitioner or the Bill of Rights.

The answer may be the Congress would give up its right to imprison those it investigates and finds guilty. Instead it would refer criminal matters to appropriate federal and state authorities. Congress could then proceed to remove members and to bar them entry, without the threat of imprisonment. However, so long as Congress retains the right to imprison it places a person at risk of imprisonment and bars a subsequent criminal prosecution.

An analogous circumstance arises from proceedings under the Uniform Code of Military Justice, which are followed by a trial commenced in another forum. In *Grafton v. United States*, 206 U.S. 333 (1907) and *United States v. Stokes*, 12 M.J. 229 (USMA 1982), the Courts held that trials emanating from different tribunals empowered by the same sovereign could not proceed without violating the Constitutional provisions against Double Jeopardy. In *Grafton*, the United States Supreme Court held that acquittal of a soldier of a charge of violating the 62d Article of War precluded the then-territory of the Philippine Islands from prosecuting him for murder for the same conduct. The 62d Article of War - which the soldier was charged with violating - provided as follows:

> "All crimes not capital, and all disorders and neglects which officers and soldiers may be guilty of to the prejudice of good order and military discipline, though not mentioned in the foregoing Articles of War, to be taken cognizance of by a general, or a regimental, garrison, or field officers' court martial, according to the nature and degree of the offense, and punished at the discretion of such court."

In vacating the conviction of the territorial court, the Supreme Court observed as follows:

> "The express prohibition of double jeopardy for the same offense means that wherever such prohibition is applicable, either by operation of the Constitution or by action of Congress, no person shall be twice put in jeopardy of life or limb for the same offense. Consequently, a civil court proceeding under the authority of the United States cannot withhold from an officer or soldier of the Army the full benefit of that guarantee, after

> he has once tried in a military court of competent jurisdiction." *Grafton* at 351-352.

The Court distinguished the case before it from instances in which trials were held in state courts after federal proceedings:

> "The Government of a State does not derive its powers from the United States, while the Government of the Philippines owes its existence wholly to the United States, and its judicial tribunals exert all their powers by authority of the United States." *Grafton* at 354.

To the same effect was the decision of the U.S. Court of Military Appeals in *Stokes*, where the Court stated with regard to the Fifth Amendment protection against double jeopardy:

> "Undoubtedly this provision was not intended to abolish the dual-sovereignties rule that had been applied in interpreting constitutional guarantees against successive trials for the same offense. Thus, trial by a court martial is barred by the Code only if the accused has already been tried in a court which derives its authority from the federal government." *Stokes* at 231.

The conclusion to be drawn from *Stokes* is, of course, that if the tribunals do derive their powers from the same sovereign, then the decisions are binding.

A similar analysis came in the decision of the United States Supreme Court in *Waller v. Florida,* 397 U.S. 387 (1970). There, the Supreme Court held that a person could not lawfully be tried by both a Florida municipality and the State of Florida, holding that since each derived its authority from the same sovereign, the Fifth Amendment barred the subsequent prosecution by this State.

In this case, the District Court and the House are entities of the same sovereign, the Government of the United States. Both the Court and the House derive their authority from the same Constitution. Thus, the federal government put the Petitioner in jeopardy twice for the same conduct, clearly violating the Fifth Amendment to the United States Constitution.

If this principal is not respected, nothing stands in the way of a member of Congress being tried and convicted in District Court and sentenced to prison only to face yet another prison sentence for the same conduct upon his release, the latter a result of a sanction imposed by Congress.

This cases raises grave legal issues regarding whether individual rights and protections granted by the Bill of Rights should be ignored in favor of avoiding problems with the separation of powers. Accordingly, review by this court is crucial to the limitless mission of this court to protect and defend the Constitution of the United States.

II. WHETHER THE JUROR SELECTION PLAN FOR THE EASTERN DIVISION, NORTHERN DISTRICT OF OHIO GIVES AN UNFAIR ADVANTAGE TO THE GOVERNMENT IS AN IMPORTANT MATTER OF FEDERAL LAW AND SHOULD BE SETTLED BY THIS COURT.

Petitioner was denied his rights under the Fifth and Sixth Amendments of the United States Constitution because procedural methods employed in the Northern District of Ohio, Eastern Division, assured that his jury would not be representative of the District in which the case was tried. The Jury Selection Plan of the Northern District of Ohio, in combination with the method of criminal case assignment in the Eastern Division of the Northern District of Ohio, denied the defendant any opportunity to be tried by a jury that would include residents of specific counties within the District.

A. Jury Challenge Was Properly Raised Prior to Trial

The district court and the appellate court refused to consider Petitioner's challenge to the jury selection process because he submitted his challenge five days after the court imposed pretrial motion deadline, although more than three

(3) weeks before jury selection began. The Government had adequate opportunity to respond and the Court had adequate opportunity to decide the issue.

In refusing to consider the merits, the Sixth Circuit failed to follow its own precedent favoring the consideration of such challenges if they are raised prior to trial. *United States v. Blair*, 24 F. 3d 690 (2000); *United States v. Spearman*, 166 F. 3d 1215 (1998) and *United States v. Greene*, 971 F. Supp. 1117 (E.D. MI 1997).

The effect of both courts' rulings was to apply a rule of procedure, not found in the federal rules, to bar the review of the constitutionality of a jury. "The Constitution requires that every effort be made to see to it that a defendant in a criminal case has not unknowingly relinquished the basic protections that the Framers thought indispensable to a fair trial," *Schneckloth v. Bustamonte,* 412 U.S. 218, 241-42, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973) and among these "basic protections" is the right to a trial by jury. *Adams v. United States ex rel. McCann,* 317 U.S. 269, 276, 63 S.Ct. 236, 87 L.Ed. 268 (1942) The basic protection of a right to trial by jury includes the right to a jury representing a fair-cross section of the community. *Taylor v. Louisiana,* 419 U.S. 522, 526-31, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975).

B. The Constitutionality of Petitioner's Jury Warrants Review.

This court should accept review to consider whether the combination of the Jury Selection Plan and the case assignment method caused deprivation of the Appellant's rights under the Fifth Amendment. To be clear, it is the interplay between the case assignment method and the jury selection plan that creates the problem.

By requiring all criminal cases to be filed in Cleveland and assigned based on a random draw with equal shares to all judges, the Jury Selection Plan assures that eight out of nine juries will not have anyone from three counties in the District. Once one of the eight judges not sitting in Youngstown was assigned his case, Petitioner had no chance of having a single juror from those three counties. As such the jury did not represent a jury of Petitioner's peers as guaranteed in the Sixth Amendment. The Jury Selection Plan, otherwise fair and proper, was trumped by the case assignment method.

To state a *prima facie* claim under the Sixth Amendment, a party must demonstrate the following:

> [A] defendant must prove that: (1) the group claimed to be excluded is distinctive in the community; (2) the

> representation of the group in the jury pool is not fair and reasonable in relation to the number of members of the group in the community, and (3) the under-representation is the result of systematic exclusion of the group in the jury selection process. *Duren v. Missouri*, 439 U.S. 357, 364 (1979). The defendant need not prove discriminatory intent o the part of those constructing or administering the jury selection process. See Id. at 368 n. 26, 99 S.Ct. at 670; *Alston v. Manson*, 791 F. 2d 255, 258 (2d Cir. 1986), cert. denied, 479 U.S. 1084 (1987).

United States v. Jackman, 46 F.3d 1240, 1245-46 (2d. 1995).

Here Appellant challenged the exclusion of 17th Congressional District residents. The 17th District is made up of Mahoning and Columbiana Counties and substantially all of Trumbull County. The boundaries of the 17th District are practically coterminous with those of the Youngstown jury division. It is indisputable that a congressional district constitutes a distinct cognizable group for equal protection purposes. *Reynolds v. Sims*, 377 U.S. 533, 563 (1962); *Shaw v. Reno*, 509 U.S. 630 (1993).

Because people in a congressional district are a cognizable group for purposes of equal protection in the context of a voting rights case, then it is a cognizable group for purposes of an equal protection jury selection challenge. See *Jury Service as Political Participation Akin to Voting,* 80

Cornell L.R. 203 (1995). It is inconceivable that the federal courts can require Congress to assure that citizens of congressional districts have equal rights in relation to involvement in participatory government, but then deny citizens the same access to participation in the federal judicial system.

In *Powers v. Ohio,* 499 U.S. 400 (1991), the Court stated:

> "The purpose of the jury system is to impress upon the criminal defendant and the community as a whole that a verdict of conviction or acquittal is given in accordance with the law by persons who are fair. The verdict will not be accepted or understood in these terms if the jury is chosen by unlawful means at the outset. Upon these considerations, we find that a criminal defendant suffers a real injury when the prosecutor excludes at his or her own trial on account of race."

The *Powers* rationale is analogous. Appellant objected to the jury selection procedures a number of times as unfairly discriminatory against 17th District jurors. Although the *Powers* decision focuses on racial discrimination, the rationale is the same. A criminal defendant suffers a real injury when prospective jurors from the division which a) he resides, b) all of the alleged crimes took place, and c) he serves as their elected representative, are statistically substantially less likely to be eligible for jury service without a compelling governmental interest.

Whether intentional or innocent, the circumstances of case assignment and jury selection made it highly unlikely that Appellant would have people from his Congressional district as part of the jury pool. It may well have been the case that the Government could have stricken such jurors, but in so doing it would no doubt have had to exercise some of its limited preemptory challenges it had. The skewing of the jury pool thus gave the Government an unfair advantage. It also created an impression with the public that the Government was assisted in obtaining a conviction through gerrymandering.

This issue, which invokes protections under the Fifth and Sixth Amendments to the United States Constitution, warrants review by this court.

CONCLUSION

For the reasons stated, this Court should grant *certiorari* to remedy the constitutional violations that undermine Mr. Traficant's conviction and sentence.

Respectfully submitted,

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APPENDIX

Appendix A	*U.S. v. Traficant*, 368 F.3d 646 (6th Cir. 2004).
Appendix B	*U.S. v. Traficant*, 209 F.Supp.2d 764 (N.D.Ohio 2002).
Appendix C	Jury Selection Plan For the Northern District of Ohio
Appendix D	Northern District of Ohio Local Rule 57.10.
Appendix E	Motion for Inclusion of All Counties in the Northern District of Ohio In the Voir Dire
Appendix G	Rules Governing the Committee on Standards of Official Conduct.
Appendix H	Motion to Bar Sentencing

Appendix A

368 F.3d 646, 2004 Fed.App. 0146P

United States Court of Appeals,
Sixth Circuit.
UNITED STATES of America, Plaintiff-Appellee,
v.
James A. TRAFICANT, Jr., Defendant-Appellant.
No. 02-3864.
Argued: Dec. 9, 2003.
Decided and Filed: May 19, 2004.

Background: Defendant was convicted in the United States District Court for the Northern District of Ohio, Lesley Brooks Wells, J., of violating federal anti-corruption statutes. Defendant appealed.

Holdings: The Court of Appeals, Cole, Circuit Judge, held that:
(1) defendant did not waive double jeopardy argument;
(2) Double Jeopardy Clause did not preclude a member of the U.S. House of Representatives from being disciplined by Congress as well as being prosecuted and convicted criminally for same conduct;
(3) defendant's sentencing did not result in a new and separate jeopardy; and
(4) defendant waived his right to challenge the jury selection process used in his criminal prosecution.
Affirmed.

OPINION

COLE, Circuit Judge.

James A. Traficant, Jr., a Member of the U.S. House of Representatives from 1985 until 2002, appeals his conviction and sentence for violating federal anti-corruption statutes. On appeal,Traficant argues that: (1) his sentencing by the district court, following his expulsion from the House of Representatives, overrode his Fifth Amendment protection against Double Jeopardy; and (2) his jury was selected in a manner at odds with his Fifth and Sixth Amendment rights because of the disproportionate chance that the petit jury would lack residents of his congressional district. For the following reasons, the convictions and sentence are **AFFIRMED.**

I. BACKGROUND

On May 4, 2001, a federal grand jury returned a ten-count indictment against then-Congressman Traficant, charging that he violated the federal bribery statute, conspired to violate the federal gratuity statute, accepted an illegal gratuity, obstructed justice, conspired to defraud the United States, filed false tax returns, and conducted the affairs of an enterprise through a pattern of racketeering activity. A superseding indictment was returned on October 26, 2001. The jury for Traficant's case, set to be tried in the Eastern Division of the United States District Court for the Northern District of Ohio, was chosen according to **649* that court's Jury Selection Plan ("the Plan"). For purposes of jury selection, the Plan assigns to each of the Eastern Division's three courthouses--which are located, respectively, in Cleveland, Akron and Youngstown--a discrete set of counties, whose eligible residents constitute the prospective jurors for its designated courthouse. The judge for each case is drawn at random, but the number of judges at each venue naturally affects the odds that a particular location will host the trial. When Traficant was indicted, there were six active judges sitting in Cleveland, but only one apiece in Akron and Youngstown. Although in Congress, Traficant represented Youngstown, his case was assigned to Cleveland, limiting his jury to residents of the Cleveland-designated counties, none of which Traficant represented. The evidence at trial--throughout which Traficant served as his own lawyer--demonstrated, among other things, that while he was a congressman, Traficant demanded thousands of dollars in goods and services from businesses in return for official favors, including contacting the Director of the Federal Aviation Industry, the Secretary of State, and the King of Saudi Arabia; paid inflated salaries to his staffers, who were required to kickback the difference to their boss; and forced his congressional staffers to bale hay, repair plumbing, and reinforce barns at his show-horse farm. By a special verdict, a jury convicted Traficant on all counts.

Then Congress entered the fray. After holding hearings, the House Ethics Committee's Adjudicative Subcommittee concluded that the conduct underlying Traficant's convictions gave the committee a "substantial reason to believe" that Traficant had also violated three clauses of the House Code of Official Conduct. These clauses require that a House member: "[s]hall conduct himself at all times in a manner that shall reflect creditably on the House" (Clause One); "shall adhere to the spirit and the letter of the Rules of the House and to the rules of duly constituted committees thereof" (Clause Two); and "may not receive compensation and may not permit compensation to accrue to his beneficial interest from any source, the receipt of which would occur by virtue of influence improperly exerted from his position in Congress" (Clause Three). *See* H.R. Con. Res. 5, 107th Cong. (2001), at Rule 23. On July 24, 2002, the full House of Representatives voted to expel Traficant.

Six days later, the district court sentenced Traficant (who by this point, had retained counsel) to eight years in prison, three years of supervised release, and $150,000 in fines. Traficant timely appealed.

II. ANALYSIS

A. Double Jeopardy

Traficant contends that he was twice placed in jeopardy: first, when the House of Representatives initiated hearings that included the possibility of his imprisonment, *see Kilbourn v. Thompson,* 103 U.S. 168, 189, 26 L.Ed. 377 (1880) ("[T]he Constitution expressly empowers each House to punish its own members for disorderly behavior. We see no reason to doubt that this punishment may in a proper case be imprisonment."); and second, after Congress had already expelled him, when the district court ordered his imprisonment.

The Government contends that Traficant has waived this argument because he articulated a slightly different basis for this claim below than he did here. Before the district court, Traficant classified his expulsion from the House as a punishment "essentially criminal in character." Here, Traficant highlights that his ***650** purported violation of House Ethics Rules carried "the possibility of incarceration." Although the two arguments vary in their particulars, both maintain that his judicially imposed sentence violated double jeopardy and that jeopardy first attached when the House commenced the disciplinary proceedings that led to his ejection from Congress. Because we allow defendants to refine their original arguments for the litigation's later stages, *see, e.g., United States v. Miller,* 161 F.3d 977, 984 (6th Cir.1998) (defendant's appeal of sentencing enhancement was preserved even though defense counsel failed to specifically request certain later-sought factual findings below), and because Traficant's overall double jeopardy argument parallels the one he made below, we will consider it.

1. Separation of Powers

Traficant's argument implicates the Constitution's separation of powers. Congress and the Executive have authority that in some cases may overlap: the Executive is responsible for enforcing the laws, *see* U.S. Const. Art. II, sec. 1 ("The executive Power shall be vested in a President of the United States of America."); § 3 (requiring the President to "take care that the Laws be faithfully executed"), and Congress is responsible for disciplining its own members, *see* U.S. Const. Art. I., sec. 5, cl. 2 ("Each House may ... punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a member."). Traficant contends that the Double Jeopardy Clause allowed either Congress or the Executive--but not both--to bring an action against him.

Traficant's argument--that the Double Jeopardy Clause applies across the branches--would implicate the Constitution's provision for the separation of powers. Classifying the imposition of congressional discipline as a "jeopardy" would mean that merely by punishing (or contemplating punishing) one of its members for conduct that also violates federal law, the Legislative Branch could restrain the Executive Branch from fulfilling its constitutional responsibility to enforce federal law. Notwithstanding "the Executive Branch ['s] ... exclusive authority and absolute discretion to decide whether to prosecute a case," *United States v. Nixon,* 418 U.S. 683, 693, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974), Traficant's theory would shield would-be felons--who just so happen to sit in Congress--from criminal prosecution by the Department of Justice. Congress's slap on the wrist, or even its mere contemplation of a slap on the wrist, would forever tie the Executive Branch's hands. Conversely, under Traficant's argument, a representative's criminal prosecution by the Executive Branch would immunize that representative from discipline imposed by Congress. If the Double Jeopardy Clause enveloped this type of internal congressional housekeeping, the prior prosecution of a congressman might immunize him from expulsion, or even reprimand. Congress could be powerless to discipline the subset of representatives it would likely consider to be most deserving of reprimand or removal: those convicted of federal crimes. Such a result would flout both common sense and the Supreme Court's declaration in *Burton v. United States,* 202 U.S. 344, 369, 26 S.Ct. 688, 50 L.Ed. 1057 (1906), that the Expulsion Clause's empowerment of Congress, and Congress alone, to discipline its members survives a legislator's criminal conviction.

Traficant argues, however, that other Supreme Court precedent demands his release. First, Traficant invokes *Grafton v. United States,* 206 U.S. 333, 27 S.Ct. 749, 51 L.Ed. 1084 (1907), in which the Court held that the Double Jeopardy Clause ***651** barred a soldier's prosecution for homicide in the courts of the Philippines, at the time a territory of the United States, because the soldier had already been acquitted of the same charge by a military court-martial. But in *Grafton,* the Executive Branch prosecuted both cases; both the military and civilian prosecutions were under the President's ultimate control. Thus, under *Grafton,* the Executive Branch gets only one bite at the apple, which is all that the Executive has requested in Traficant's case.

Second, Traficant relies on *United States v. Dixon,* 509 U.S. 688, 699, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993), in which a plurality of the court explained that "to say that Congress can punish [the refusal of a witness to testify before it] is not to say that a criminal court can punish the same refusal *yet again.*" (emphasis in original). The *Dixon* hypothetical addressed only Congress's own prerogative: to subpoena a witness to testify before a congressional hearing. If anything, *Dixon* quashes Traficant's reasoning, for the Executive Branch is barred from enforcing congressional contempt orders by separation of powers. *Anderson v. Dunn,* 19 U.S. (6 Wheat.) 204, 220-24, 5 L.Ed. 242 (1821).
Finally, at oral argument, Traficant relied on *Powell v. McCormack,* 395 U.S. 486, 89 S.Ct. 1944, 23 L.Ed.2d 491

(1969). *Powell* sustained a congressman's constitutional challenge to the House's refusal to seat him following his reelection. The Court held that the explicit list of prerequisites to joining the House set forth by the Constitution in Article I, section 2, implicitly preempted Congress from imposing additional conditions, notwithstanding its power under Article I, sec. 5, cl.2 to "be the Judge of the Elections, Returns, and Qualifications of its own Members." In other words, the Court simply defined whether the Constitution affirmatively granted a certain power to a particular branch of government. Federal courts demarcate such boundaries routinely. *See, e.g., United States v. Lopez,* 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995) (Article I did not authorize Congress to criminalize possession of firearms near schools); *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153 (1952) (Article II did not authorize President to federalize steel mills absent legislative authorization); *McConnell v. Federal Election Commission,* 540 U.S. 93, ----- ----, 124 S.Ct. 619, 707-08, 157 L.Ed.2d 491 (2003). (Article III did not authorize federal courts to evaluate constitutional challenge to provisions of campaign-finance legislation which caused plaintiff no concrete injury). That we inevitably must identify the outer perimeter of each branch's constitutional power does not mean that we may provide for one branch's intrusion into another's undisputed constitutional responsibilities.

Although Traficant contends that rejecting his argument would subject a federal legislator to imprisonment for the same conduct by both the courts and Congress, the latter's power to imprison its members is uncertain. The century-old Supreme Court passage which Traficant believes affirms Congress's power to do so is dictum, *see Kilbourn, supra,* and the Supreme Court has never squarely held that Congress may imprison its own members. Even assuming that it can, Congress has not done so even once, dating back to the year

1787. A concern so speculative--perhaps illusory--cannot redefine the relationship among the three branches of government.

The Constitution functions as a coherent whole, not as a series of isolated and unrelated clauses, such that we cannot interpret one of its provisions to enfeeble ***652** another. *Cf. Fitzpatrick v. Bitzer,* 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976) (Eleventh Amendment immunity yields to enforcement of legislation enacted pursuant to the Fourteenth Amendment). Because it would thwart the constitutional separation of powers if Congress could shield its members from criminal prosecution by the Executive Branch, we cannot read the Double Jeopardy Clause to include Congress's disciplining its own members.

2. When Jeopardy Attached

Assuming that congressional disciplinary proceedings could implicate the Double Jeopardy Clause, Traficant must do more than point to the attachment of two separate jeopardies. He must also demonstrate that the subject of his challenge--here, his sentencing by the district court--was "a successive criminal prosecution that placed [him] in jeopardy a *second* time." *Dep't of Revenue of Montana v. Kurth Ranch,* 511 U.S. 767, 784, 114 S.Ct. 1937, 128 L.Ed.2d 767 (1994) (emphasis added). From the perspective of the Double Jeopardy Clause, order matters. If jeopardy attached first from Traficant's criminal prosecution in the courts, then any impermissible second jeopardy would result only from the actions of Congress.

The Government argues that the first (and in its view, the only) time that Traficant was placed in jeopardy was when his federal judicial proceedings commenced. The Government is right: "[j]eopardy attaches when the jury is empaneled and sworn." *Crist v. Bretz,* 437 U.S. 28, 29, 98

Traficant's tardiness, and we review its decision under an abuse **653* of discretion standard. *See United States v. Kincaide,* 145 F.3d 771, 778 (6th Cir.1998).

Traficant argues that the district court should have considered his jury challenge because he missed the deadline by only a few days, invoked an important constitutional right, and represented himself. But our precedent dictates that neither the defendant's self-representation nor the constitutional nature of the filing requires the district court to overlook its tardiness. *See id.* Traficant maintains, however, that the right to a fair jury is different in kind, and overrides the filing deadline. In some sense, he is correct. "The Constitution requires that every effort be made to see to it that a defendant in a criminal case has not unknowingly relinquished the basic protections that the Framers thought indispensable to a fair trial," *Schneckloth v. Bustamonte,* 412 U.S. 218, 241-42, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973), and among these "basic protections" is the right to a trial by jury. *Adams v. United States ex rel. McCann,* 317 U.S. 269, 276, 63 S.Ct. 236, 87 L.Ed. 268 (1942). And of course, the basic protection of a right to trial by jury includes the right to a jury representing a fair-cross section of the community. *Taylor v. Louisiana,* 419 U.S. 522, 526-31, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975). That said, Traficant had full opportunity to challenge the jury selection process in a timely fashion. Eight months separated Traficant's indictment and filing deadline, and the district court reminded Traficant of this deadline several times during this span. Moreover, when Traficant decided to represent himself, the district court warned him that doing so was risky, but Traficant told the court that "I understand the Rules of Criminal Procedure ... [a]nd if I make a mistake, it's my fault." This might very well be a different case if the district court forced Traficant to make an on-the-spot decision about whether to object to his jury composition. *Cf. Walton v. Briley,* 361 F.3d 431, 433-34 (7th Cir.2004). But given both the amount of time he had to challenge the jury, and the number of times that the district court reminded him of the deadline, the denial of Traficant's tardy motion was neither unlawful nor unfair.

III. CONCLUSION

For the preceding reasons, the convictions and sentence of the district court are

APPENDIX B

209 F.Supp.2d 764

United States District Court,
N.D. Ohio,
Eastern Division.
UNITED STATES of America, Plaintiff,
v.
James A. TRAFICANT, Jr., Defendant.
No. 4:01CR207.
June 25, 2002.

Following conviction, defendant moved for a new trial, or in the alternative, to arrest the judgments of guilt. The District Court, Wells, J., held that: (1) exclusion of defense witness's testimony was appropriate where defendant did not turn over witness's statement to the government as required by discovery rules; (2) defense witness's testimony regarding declarant's statement that defendant did not give kickbacks to declarant was irrelevant and inadmissible substantive evidence or as impeachment evidence; (3) court's trial management remarks with the jury present, which reminded defendant that he had a right to testify, did not constitute impermissible comment on the defendant's failure to testify; (4) defendant's statutory and constitutional challenge to the juror selection plan was untimely; and (5) residents of a geographic area were not a distinct, cognizable group based on their place of residence alone for purposes of challenges brought under Jury Selection and Service Act (JSSA) and Sixth Amendment.
Motion denied.

James A. Traficant, Jr., Youngstown, OH, pro se.
Lloyd Pierre-Louis, Esq., Law Office of Lloyd Pierre-

Louis, Percy Squire, Law Office of Percy Squire, Columbus, OH, for Defendant.

MEMORANDUM OF OPINION AND ORDER DENYING DEFENDANT TRAFICANT'S MOTION FOR NEW TRIAL

WELLS, District Judge.

A jury found Defendant Traficant guilty of counts one through ten of the superseding indictment on 11 April 2002. (Docket # 341). On 22 April 2002, Defendant Traficant filed a timely motion for a new trial. (Docket # 347). That same day, a supplemental memorandum to the motion for a new trial was filed on Congressman Traficant's ***766** behalf by Attorneys Percy Squire and Lloyd Pierre-Louis. [FN1] (Docket # 349). The United States responded to the arguments made in the original motion for a new trial on 3 May 2002. (Docket # 354). The United States filed a response to the supplemental memorandum on 29 May 2002. (Docket # 403). The defendant, in turn, filed a reply on the Juror Selection Plan issue. (Docket # 411).

FN1. In its 7 May 2002 Order Regarding Representation of Defendant Traficant, this Court decided that Attorneys Squire and Pierre-Louis may serve as co-counsel during post-trial proceedings before this Court for the limited purpose of challenging the Juror Selection Plan of the Northern District of Ohio. (Docket # 357). Thus, the Court accepted for review the supplemental memorandum in support of the motion for new trial, which challenges the Juror Selection Plan of the Northern District of Ohio.

For the reasons that follow, Congressman Traficant's motion for a new trial is denied.

I. STANDARDS

Congressman Traficant moves for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure, or in the alternative, moves to arrest the judgments of guilt against him pursuant to Rule 34 of the Federal Rules of Criminal Procedure.

Rule 33 provides, "On a defendant's motion, the court may grant a new trial to that defendant if the interests of justice so require." Rule 34 provides, "The court on motion of a defendant shall arrest judgement if the indictment or information does not charge an offense or if the court is without jurisdiction of the offense charged."

II. ANALYSIS

In his original motion for a new trial, Congressman Traficant presents four arguments as to why he is entitled to a new trial. Congressman Traficant claims: (1) this Court erred by preventing Russell Saadey, Jr. from testifying at trial; (2) this Court erred by not permitting Linda Kovachik to testify to certain statements at trial; (3) this Court deprived him of a fair trial by making certain remarks with the jury present; and (4) he discovered new evidence that is material and would probably result in a different verdict at a new trial. In their supplemental memorandum, Attorneys Squire and Pierre-Louis contend that the Juror Selection Plan of the Northern District of Ohio fails to comply with federal statutes and the U.S. Constitution because it results in geographic under-representation of Youngstown jury division voters on juries in the district.

This Court will examine each argument in turn.

A. Russell Saadey's Testimony

Congressman Traficant argues that the Court erred when it denied the jury an opportunity to hear the testimony of Russell Saadey, Jr. He contends that the testimony would not have been hearsay because it met the requirements for the statement against interest exception of Rule 804(b)(3) of the

Federal Rules of Evidence and the excited utterance exception of Rule 803(2).

In its 1 April 2002 Order Granting the Government's Oral Motion to Bar the Testimony of Russell Saadey, Jr., this Court ruled that Mr. Saadey could not testify as a defense witness because Congressman Traficant violated Federal Rule of Criminal Procedure 26.2, [FN2] not because of any **767* hearsay problems. [FN3] (Docket # 317). The Court explained,

FN2. Rule 26.2(a) provides, After a witness other than the defendant has testified on direct examination, the court, on motion of a party who did not call the witness, shall order ... the defendant ... to produce, for the examination and use of the moving party, any statement of the witness that is in [his] possession and that relates to the subject matter concerning which the witness has testified. Rule 26.2(f) defines a "statement" to include a mechanical recording of an oral statement. Rule 26.2(e) explains the sanction for failure to produce a statement: "If the other party elects not to comply with an order to deliver a statement to the moving party, the court shall order that the testimony of the witness be stricken from the record and that the trial proceed."

FN3. In light of the Court's ruling that Mr. Saadey's testimony was excluded under Rule 26.2, the Court did not rule on the hearsay issues surrounding Mr. Saadey's testimony. During a voir dire outside the presence of the jury, Mr. Saadey testified that James Sabatine told him that "he gave political contributions, not bribes" to Congressman Traficant. (3/27/02 Tr. at 5213). This statement is not a statement against interest so the Rule 804(b)(3) exception would not apply. Even if the statement were an excited utterance, its admission would not have affected the outcome of the trial because the jury did not find that Congressman

Traficant committed the racketeering act involving James Sabatine.

Defendant Traficant claims to have possessed an audiotape containing the oral statement of a defense witness. According to the Congressman's representations, the taped statement involved issues at the heart of the witness's testimony. Yet, after the direct examination portion of the voir dire and in response to a government request and a Court order to produce the tape, Defendant Traficant unambiguously indicated that he would be unable to produce the audiotape because he had totally destroyed it the night before.
By destroying the tape, Congressman Traficant elected not to turn it over to the government as required by Rule 26.2. (Docket # 317 at 4).
Under Rule 26.2, this Court's decision to bar Mr. Saadey's testimony was appropriate. Congressman Traficant is not entitled to a new trial on the basis of the exclusion of Mr. Saadey's testimony.

B. Linda Kovachik's Testimony

Next, Congressman Traficant asserts that this Court erred when it did not permit Linda Kovachik, a defense witness, to testify to a statement by Charles O'Nesti to her regarding kickbacks.
In his motion for a new trial, Congressman Traficant argues that Ms. Kovachik's testimony regarding Mr. O'Nesti's statement should have been admitted as substantive evidence under Rule 807, as a residual exception to the hearsay rule of the Federal Rules of Evidence. During the trial, Mr. Traficant offered the statements first as substantive evidence and then under Rule 613(b) only to impeach the prior testimony of Jacqueline Bobby and Grace Kavulic, who testified that Mr. O'Nesti complained to them that he had to make salary kickbacks to Congressman Traficant. *See* 2/19/02 Tr. at 562,

644-45.

In its 1 April 2002 Order Regarding Testimony to Impeach Government Witnesses, this Court explained,

Linda Kovachik testified as a defense witness on 27 March 2002. A hearsay voir dire outside the presence of the jury was held the next morning. During the voir dire, Ms. Kovachik testified that Charles O'Nesti stated to her: "I had not gotten any kickbacks from Jim." (3/28/02 Tr. at 5274). At the time of the testimony and hearsay voir dire of [Ms. Kovachik and two other defense witnesses], Defendant Traficant argued that the statements of ... Charles O'Nesti were admissible as substantive evidence under an exception to the hearsay rule.

**768* However, in his motions of 27 March 2002, Defendant Traficant contended for the first time that he sought to admit the above statements only for the purpose of impeaching the testimony of ... Jacqueline Bobby, and Grace Kavulic. (Docket # 319 at 2).

The Court continued,

Ms. Kovachik's testimony regarding Mr. O'Nesti's alleged statement to her is not admissible. The statement cannot be used to impeach prior testimony by Ms. Bobby or Ms. Kavulic because it is not inconsistent with any testimony by either witness. Neither witness testified that Mr. Traficant gave kickbacks *to* Mr. O'Nesti.

(Docket # 319 at 4) (emphasis added).

Put simply, Ms. Kovachik's voir dire testimony that Charles O'Nesti stated to her: "I had not gotten any kickbacks *from* Jim" could not be admitted as either substantive evidence or to impeach the testimony of Ms. Bobby and Ms. Kavulic. The statement could not be admitted as substantive evidence because it was irrelevant under Rules 401 and 402 of the Federal Rules of Evidence; there were no allegations in the superseding indictment that Congressman Traficant made kickbacks *to* Charles O'Nesti. The statement could not be admitted to impeach the testimony of Ms. Bobby or Ms.

Kavulic because neither testified that Congressman Traficant made any kickbacks *to* Charles O'Nesti.

Under the Federal Rules of Evidence, this Court's decision not to admit Ms. Kovachik's testimony regarding Mr. O'Nesti's statement to her was correct as a matter of law. Congressman Traficant is not entitled to a new trial on the basis of the exclusion of this portion of Ms. Kovachik's testimony.

C. This Court's Remarks

Congressman Traficant argues that this Court deprived him of a fair trial when the Judge asked him, on the morning of 3 April 2002, after the Congressman announced, with the jury present, "I have no other witnesses", whether he was prepared to rest and whether he intended to testify as a witness.

The context sheds light on these remarks in this protracted trial. Throughout the presentation of his defense, Mr. Traficant consistently failed to produce or call a sufficient number of witnesses to fill the trial day and frequently said he did not know who his witnesses would be for the next court session. [FN4] As a result, the jurors and alternate jurors, some of whom traveled as long as *five hours* each day to and from the court house, frequently had to be excused early, unnecessarily prolonging their jury service in this ten week trial.

FN4. The United States' brief lists at least ten occasions when these failures of the Congressman to have his witnesses available resulted in delays during this long trial. (Docket # 354 at 5-9).

All the trial participants were affected. On 21 March 2002, this Court agreed to excuse the jury for the next day in order to provide Congressman Traficant with an opportunity to voir dire two particular defense witnesses in his efforts to establish the requirements for an exception to the hearsay rule for certain statements by them. (3/21/02 Tr. at 4541, 4560). However, on Friday, 22 March 2002, with everyone else ready to proceed, Congressman Traficant failed to produce either witness for voir dire and the day's proceedings had to be adjourned after only a few minutes. (3/22/02 Tr. at 4564). On the next trial day, Monday, 25 March 2002, the jury was excused early because Congressman Traficant ran out of witnesses. (3/25/02 Tr. at 4767). After encountering the same problem on Tuesday, ***769** 26 March 2002, the Court had to release the jury early and, mindful of defendant's *pro se* status, the court again instructed the Congressman to bring enough witnesses to fill the next trial day. (3/26/02 Tr. at 4954).

The Court had no choice but to again release the jury early on Monday, 1 April 2002. (4/1/02 Tr. at 5602). On Tuesday, 2 April 2002, Congressman Traficant's continuing failure or refusal to bring a sufficient number of witnesses forced the Court to dismiss the jury early yet again. (4/2/02 Tr. at 5778). In order to ensure that the next trial day could proceed, the Court, the *pro se* defendant, and counsel for the United States had a discussion, outside the presence of the jury, of who he would call on Wednesday.

MR. TRAFICANT: I'm looking for the fellow from T.C. Ready Mix who is out of town. I'm trying to find a custodian of records of T.C. Ready Mix to see if I can get them here. And I thought a fellow did some work at the farm, I thought this was that fella, [a witness the defendant had subpoenaed and just examined] unless the name is unusually different. I thought it was a Tim Chesney, not a Herb Chesney. And Mr. Terlecky now. And if Mr. Morford takes my request, then we'd be closing out with me ... And I'm winding my case down.

(4/2/02 Tr. at 5769-71). The United States responded:

MR. MORFORD: Your Honor, the problem here is we ask every night for the Congressman to tell the Court who he's going to call to avoid these kind of problems. The

Congressman knew what he wanted Mr. Kerchum to testify to, and he knew what he wanted Mr. Hudach to testify to, and he knew this Court had already had a ruling months ago saying he couldn't do that. So he knew they weren't going to be able to testify. Your Honor told Congressman Traficant yesterday to have Mr. Terlecky and Mr. Johnson here today, and his comment was, "I'm not calling them until I see an order." The Court issued an order last night, and he didn't call him and he didn't call him until this morning, and this is not the first time he's run out of witnesses....And now he's not telling you who he's going to call tomorrow, and we're going to go through this again.

(4/2/02 Tr. at 5772-73). Outside the presence of the jury, the Court again instructed the *pro se* defendant:

THE COURT: Congressman, this is your case. You're supposed to be prepared. You're supposed to get your witnesses and get your subpoenas out....[Y]ou need to present witnesses when [the] jury is here.

(4/2/02 Tr. at 5773-74).

The jury had been in the box less than two hours during the morning of Wednesday, 3 April 2002 when the Congressman announced: "I have no other witnesses." The Court therefore inquired, "Congressman, do you rest?" The Congressman sarcastically replied: "Every evening." (4/3/02 Tr. at 5846). The Court then explained it could "not permit [the jury] to sit here idly for the balance of the day." (4/3/02 Tr. at 4847) and then stated,

You have a constitutional right not to testify. If you want to testify in this case, then please proceed. This is the time. We need witnesses on the stand.

(4/3/02 Tr. at 4847).

Congressman Traficant then proceeded to complain about and misrepresent the Court's prior rulings and attempted on the spot to strike a deal with Assistant United States Attorney Craig Morford, in which Congressman Traficant would testify only if he were permitted to cross-examine Mr. Morford.

(4/3/02 Tr. at 5848-5852). Defendant **770* announced, in the presence of the jury: "I will take the stand if Morford takes the stand on prosecutorial misconduct." (4/3/02 Tr. at 5849, 5850). The Court had already issued and hand-delivered to the Congressman a written ruling that he could not condition his testimony if he elected to take the stand. *See* Docket # 328. [FN5]

FN5. After the jury had left for the day on 4 April 2002, the defendant and Assistant United States Attorneys worked with the Court to admit exhibits into evidence and again handled issues related to scheduling. The following colloquy took place:

THE COURT: But you understand if you have no witnesses here tomorrow morning or none of your witnesses are available to testify at any time before we get to the noon hour [Friday jury recess time], then we get into this issue that you feel very concerned about, which is although we all know that you have a constitutional right not to testify, if you're going to testify, you will then have to do that sometime within the period of time where we have the jury here ready to hear evidence ... You understand that?

MR. TRAFICANT: Your Honor, I understand that. (4/4/02 Tr. at 6129-30).

Congressman Traficant's contention that the Court's trial management remarks with the jury present violated his Fourteenth Amendment due process rights has no merit. As the United States points out, this Court's remarks do not constitute impermissible comment on the defendant's failure to testify under *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965). *Griffin* holds that the Fifth Amendment forbids either comment by the prosecution on the accused's silence or "instruction by the court that such silence is evidence of guilt." Id. at 615, 85 S.Ct. 1229. Here the prosecutor made no challenged comment. The Court did not instruct, or even suggest, that silence is evidence of guilt. This Court did not instruct the jury, as the Griffin trial court had, that "if [the defendant] does not testify, or if though he does testify, he fails to deny or explain such evidence, the jury may take that failure...as tending to indicate the truth of such evidence and as indicating that among inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable." Id. at 618, 85 S.Ct. 1229. Nor did this Court's challenged remarks comment upon defendant's failure to take the witness stand. This Court's reminder to the Congressman, with the jury present, that he had a right to testify did not create negative inferences from his subsequent decision not to testify. Further, this Court did nothing to "solemnize the silence of the accused into evidence against him," or instruct the jury that silence is evidence. Id. at 614, 85 S.Ct. 1229.

On the contrary, the Traficant trial jurors had been specifically and repeatedly instructed from the beginning to the end of the trial that Congressman Traficant had "a constitutional right not to testify;" that "if he [did] not testify, that must not be considered by them for any purpose whatsoever;" that the "defendant has no obligation to present any evidence at all, or to prove in any way that he is innocent;" that the "defendant has an absolute right not to testify;" that the jury may not "consider for any purpose his decision not to testify;" and that they were not permitted to discuss or "consider for any purpose the fact that Defendant Traficant did not testify." (2/13/02 Tr. at 15-16; 4/5/02 Tr. at 6163, 6170).

The Court's questions on 3 April 2002 did not violate Congressman Traficant's constitutional rights and he is not entitled to a new trial on the basis of these trial management inquiries.

771* **D. New Evidence
Congressman Traficant also claims to have discovered new evidence after the trial that he claims is material and would probably result in a different verdict at a new trial. The Congressman's "new evidence" takes the form of five letters, [FN6] which he attaches to his motion as Exhibits 1 through 5.

FN6. Congressman Traficant refers to the letters as affidavits. However, none of the would-be affiants swear by oath or affirmation and under the pains and penalties of perjury that their statements are true. Consequently, the letters are not affidavits.

Exhibit 1 is a letter from Michael Antonoff, [FN7] in which Mr. Antonoff claims that he spoke with a Richard Gerhart, who told Antonoff that "FBI agents canvassed [his] neighborhood and questioned neighbors of his and Brian Kidwell's, [FN8] referring to Kidwell and Congressman James Traficant." (Docket # 347 at Exhibit 1). Antonoff further asserts that, according to Mr. Gerhart, the agents, who Mr. Gerhart thought were investigating stolen vehicles, "appeared more interested in Congressman Traficant and Brian Kidwell than the stolen vehicles." (Docket # 347 at Exhibit 1).

FN7. Mr. Antonoff is a private investigator who was hired by Congressman Traficant as a process server and who testified on his behalf. *See* 4/1/02 Tr. at 5460-61.

FN8. Brian Kidwell was a defense witness at trial.

This exhibit is not relevant to the charges in the superseding indictment or the credibility of any witness at trial. The Court can only assume that it was offered by Congressman Traficant to suggest that the FBI agents somehow acted in an inappropriate matter. The letter, however, indicates no misconduct on the part of the agents.

Exhibit 2 is another letter from Michael Antonoff. It is a slightly more detailed version of a letter that Congressman Traficant submitted to the Court on 15 March 2002 to support his Motion to Prohibit Government Agents From Harassing and Intimidating a Defense Witness. [FN9] (Docket # 238, 245). In his letter, Mr. Antonoff alleges that an unidentified man took pictures of his house. According to Mr. Antonoff, he followed the man's silver van in his own car. He claims that, while stopped at a red light, he "saw what appeared to be a black wallet with a small gold badge with several letters about the badge that looked like FBI." (Docket # 347 at Exhibit 2).

FN9. The motion was denied on 15 March 2002.

Like Exhibit 1, Exhibit 2 is not relevant to the charges in the superseding indictment or the credibility of any witness at trial. The letter does not even establish that any government agent, let alone an agent involved in the Traficant case, was taking pictures of Mr. Antonoff's house.

Exhibit 3 is a letter from Rick Berger, in which Mr. Berger claims to have heard the conversation between Richard Gerhart and Brian Kidwell that is the subject of Exhibit 1. Exhibit 3 is just as irrelevant as Exhibit 1.

Exhibit 4 is a letter from Rene Antonoff Lanzaro, Michael Antonoff's wife. The substance of this letter is nearly identical to that of Exhibit 2. Like Exhibit 2, Exhibit 4 is irrelevant to the charges in the superseding indictment and to the credibility of witnesses at trial.

Exhibit 5 is a letter from Brian Kidwell, in which he asserts that three unidentified men took an "unused USAG welder" out of his garage, where the welder allegedly had been stored. (Docket # 347 at Exhibit 5). According to Mr. Kidwell, the men told him that the "welder is not going to Cleveland" for the Traficant trial and that "if *772 you are asked, you did not see this welder going out of here." (Docket # 347 at Exhibit 5). Mr. Kidwell goes on to state,

> When I testified in Cleveland at the Traficant Trial, Monday, March 25, 2002, I was afraid to mention to Congressman Traficant what had occurred and led the Congressman to believe that the welder would be delivered to Cleveland for inspection.

(Docket # 347 at Exhibit 5). Mr. Kidwell then claims to have told Congressman Traficant of the alleged welder-snatching incident on 6 April 2002.

In response to Mr. Kidwell's claims, "the government unequivocally denies that it has any knowledge of the whereabouts or circumstances surrounding the welding machine." (Docket # 354 at 9-10). The United States argues that "Congressman Traficant fails to cite any legal basis under which his wild claims about the welder entitle him to any relief." (Docket # 354 at 10).

Three counts of the superseding indictment involved the USAG welder to some extent. Count 3, which charged a conspiracy to violate the illegal gratuity provision of the federal bribery statute, alleged, in part, that Congressman Traficant

> asked Defendant [Richard] Detore [of USAG] if USAG had a generator and welder he could use. Based on this request, Defendant Detore caused USAG to purchase a new generator and welder and caused USAG employees to deliver them to Defendant Traficant for and because of the official actions Defendant Traficant was taking and would take on behalf of USAG. Defendant Traficant did not pay USAG for the generator and welder.

(Superseding Indictment, Count 3, ¶ 14). The welder also was implicated in Count 9, which charged Congressman Traficant with filing a false tax return for tax year 1999, and Racketeering Act 4 of the RICO count (Count 10), which alleged an illegal gratuity involving USAG and Congressman Traficant.

Congressman Traficant called Mr. Kidwell as a defense witness on 25 March 2002. Mr. Kidwell testified that USAG purchased the welder so that he could build aluminum trailers for the company in his garage. (3/25/02 Tr. at 4727, 4758-59). According to Mr. Kidwell, he never signed a contract with or received any written confirmation from USAG regarding the trailers. (3/25/02 Tr. at 4759). He stated that USAG never placed an order. (3/25/02 Tr. at 4763). Mr. Kidwell also testified that Congressman Traficant delivered the 700 or 800 pound welder to him. (3/25/02 Tr. at 4722-23). When asked how the welder was transferred to his truck, Mr. Kidwell stated, "We backed the two trucks up together and tailgate--the tail gate and roll it on some wheels." (3/25/02 Tr. at 4723). When asked if the welder was being brought to Cleveland for the jury to view, as Congressman Traficant persistently claimed, Mr. Kidwell testified under oath that it was on its way. (3/25/02 Tr. at 4722). When asked when he expected the welder to arrive, Mr. Kidwell responded, "I'm not sure. The trailer he had it on, the wheel bearing went out on it." (3/25/02 Tr. at 4722-23). Mr. Kidwell then assured Congressman Traficant that the welder would arrive that day or the next day. (3/25/02 Tr. at 4723).

To the extent that Congressman Traficant attaches the Kidwell letter to his motion for a new trial in order to imply that the government was somehow involved with the alleged welder-snatching, this implication is not a basis for the granting of a new trial. The United States represents that it has no knowledge of the welder's location or the circumstances surrounding **773* the welder. The Kidwell letter does not contradict this representation.

Mr. Kidwell's statements in the letter are not credible. Nor is Mr. Kidwell disinterested as he and the Congressman "are pretty good friends." (3/25/02 Tr. at 4751). Mr. Kidwell's testimony at trial, taken as a whole, was not believable. He claimed that USAG bought him a welder and generator to build hi-tech trailers out of his garage, but that there was no documentation to confirm this arrangement and no order was ever placed. Thus, according to Mr. Kidwell, USAG bought the equipment for him before an order for even a single trailer was placed by USAG. Mr. Kidwell testified that, instead of shipping the welder directly to him, USAG gave the welder to Congressman Traficant so that he could transport it by truck from Washington D.C. to Youngstown, Ohio. [FN10]

FN10. Albert Lange, Jr. testified that he and Richard Detore delivered the welder to Congressman Traficant in the parking lot of his Congressional office building in Washington, D.C. (3/14/02 Tr. at 3600-01).

Mr. Kidwell implicitly concedes his lack of credibility. In his letter, he asserts that he lied on the stand when he stated that the welder was on its way to Cleveland.

The alleged welder-snatching incident is not credible. Mr. Kidwell's claim, which is uncorroborated, is that "three big white men ... loaded, by hand, lifting the welder onto the bed of the blue Ford Pickup truck." (Docket # 347 at Exhibit 5). According to Mr. Kidwell, the welder weighed 700 or 800 pounds. His testimony at trial was that moving the welder the short distance from Congressman Traficant's truck to Mr. Kidwell's truck at the same level across the two tailgates required the use of wheels.

In the letter, Mr. Kidwell states that Congressman Traficant was informed about the welder-snatching incident on 6 April 2002 at 5:50 a.m. Mr. Traficant, however, made no mention of the alleged incident until 22 April 2002, when he attached the Kidwell letter to his motion for a new trial.

Even if Mr. Kidwell's claims were credible, Congressman Traficant would not be entitled to a new trial. Although the Court, at defendant's request, made arrangements for a jury view of the welder, which was never produced, such a view could have had little or no impact on the jury's verdicts on Counts 3 and 9 and would have had no impact on their verdict for Count 10. (3/25/02 Tr. at 4573-4587). The evidence presented by the United States on Count 3 was substantial and largely un-contradicted. Both Count 3 and Count 9 included several allegations other than those involving the welder. Congressman Traficant would have been convicted of Count 10 even if the jury had decided that he did not commit Racketeering Act 4 because the jury unanimously found that he had committed seven other racketeering acts.

In short, the Kidwell letter is not "likely to produce an acquittal" on any count of the superseding indictment at a new trial. *United States v. O'Dell,* 805 F.2d 637 (6th Cir.1986). It is not the interests of justice to grant a new trial on the basis of the letter.

E. Challenge to the Juror Selection Plan

In his supplemental memorandum in support of his motion for a new trial, Defendant Traficant, represented by counsel, challenges the Juror Selection Plan of the U.S. District Court for the Northern District of Ohio ("the Plan") on the basis of geographic under-representation. He contends that the Plan violates the Jury Selection and Service Act ("JSSA"), his Sixth ***774** Amendment right to a jury representing a fair cross section of the community, and the equal protection component of the Fifth Amendment Due Process Clause. [FN11] Defendant Traficant also argues that the administration of the Plan does not comply with the terms of the Plan. [FN12]

FN11. Defendant Traficant contends that the Plan violates the Equal Protection Clause of the Fifth Amendment. However, the Equal Protection Clause is in the Fourteenth Amendment. "An equal protection claim against the federal government is analyzed under the Due Process Clause of the Fifth Amendment." *United States v. Ovalle,* 136 F.3d 1092, 1094,

n. 2 (6th Cir.1998). Equal protection analysis under the Due Process Clause is the same as that under the Equal Protection Clause. *Id.*

FN12. In its response to the supplemental memorandum, the United States addresses each of these claims. To some extent, however, the United States' analysis assumes that Congressman Traficant is still claiming that his jury venire should have been drawn, at least in part, from the counties of the Youngstown jury division. This is not the Congressman's argument. *See* Reply at 5.

In an effort to support his claims, Congressman Traficant filed an affidavit from Deborah Wasserman, PH.D., who, based on data provided by the defense and several assumptions, concluded that a voter residing in the Cleveland jury division has a 66% greater chance of being selected for jury service than a voter residing in the Youngstown jury division. (Wasserman Aff. at 2).

Congressman Traficant seeks "an immediate evidentiary hearing and oral argument ... to fully develop the extent of geographic disparity now inherent in the operation of the ... Plan." (Reply at 13).

For the reasons set forth below, this Court finds the Congressman's claims to be without merit as a matter of law, obviating the need for an evidentiary hearing.

1. The Juror Selection Plan

The Juror Selection Plan of the Northern District of Ohio was adopted by the judges of the district on 7 April 1997 and approved by the Judicial Council of the Sixth Circuit [FN13] on 8 August 1997. An amendment to Section H of the Plan [FN14] was adopted by the judges of the district on 4 June 2001 and approved by the Sixth Circuit Judicial Council on 10 July 2001.

FN13. The Sixth Circuit Judicial Council consists of the chief circuit judge, the circuit judges, and the chief judges of the nine district courts located in the Sixth Circuit. 28 U.S.C. § 332(d)(2) requires judges to carry into effect all orders of the judicial council.

FN14. The amendment modified Section H, removing a reference to randomization routines approved by the National Institute of Standards and Technology. The amendment also required that the mathematical odds of a single name being drawn from a qualified jury wheel are substantially equal. Previously, the requirement only applied to the source list and master jury wheels. These modifications do not affect the issues raised in Congressman Traficant's supplemental memorandum.

The Plan divides the Northern District of Ohio into four jury divisions, each to serve an area surrounding one of the four court house locations in the district: Akron, Cleveland, Youngstown, [FN15] and Toledo. A division is defined as: (1) one or more statutory divisions of a judicial district; or (2) *in statutory divisions that contain more than one place of holding court ... such counties ... surrounding the places where court is held as the district court plan shall determine.* 28 U.S.C. § 1869 (emphasis added). Thus, as used in the JSSA, the term division refers to the jury divisions established by the Juror Selection Plan. The District is divided into four jury divisions in order to reduce the travel time of jurors, reduce the cost to the Court **775* of mileage expenses and overnight stays, and reduce the number of hardship excuses requested and granted due to travel. Because the judge randomly assigned to this case holds court in the Cleveland Court House, the Cleveland division jury wheel was used. The Cleveland jury division consists of the following counties: Ashland, Ashtabula, Crawford, Cuyahoga, Geauga, Lake, Lorain, Medina, and Richland.

FN15. The Youngstown jury division consists of Columbiana, Mahoning, and Trumbull counties.

Each jury division has its own master jury wheel, in which the names of prospective jurors are placed. Under the Plan, the population of each county in a particular division is to be substantially proportionally represented, as to other counties, in the master jury wheel for its own jury division. For example, if 20% of a jury division's voters live in a particular county, approximately 20% of the names placed in the division's master jury wheel should be from that county. Moreover, each name in a master jury wheel must have a substantially equal chance of being drawn.
Names are drawn randomly from each division's master jury wheel for trials in that division's court house. Every person whose name is drawn is sent a juror qualification form to be completed and returned. Potential jurors who are not disqualified, exempt, or excused pursuant to the Plan have their names placed in the qualified jury wheel. Each jury division has it own qualified jury wheel. When jurors are needed for a trial in a particular division, an appropriate number of names are drawn from the qualified jury wheel of that division. [FN16]

FN16. "Ordinarily, all jurors will be summoned from the jury wheel of the court location in which the assigned Judge is sitting." (Plan at 10). However, the Plan authorizes the Judge to order the selection of a panel from another qualified jury wheel if necessary.

This process embodies the declared policy of the Northern District of Ohio "that all litigants in this Court, entitled to trial by jury, shall have the right to grand and petit juries selected at random from a fair cross section of the community in each division wherein the Court convenes." (Plan at 3). The Plan prohibits discrimination in jury selection on the basis of race, color, religion, sex, national origin, or economic status. (Plan at 3).

In this case, Defendant Traficant is not contesting the fact that each county is proportionally represented within its jury division or that every name has a substantially equal chance of being drawn from its jury wheel as any other name in that wheel. Rather, Congressman Traficant asserts that the Plan has been violated because prospective jurors in the Youngstown division jury wheels allegedly have a smaller statistical chance of being drawn than prospective jurors in the Cleveland division jury wheels.

Put simply, the plain terms of the Plan do not require that names in different master or qualified jury wheels in different jury divisions have an equal chance of being drawn. The Plan states, "The selection of names from the source list and the master wheel, and the qualified wheel must also insure that the mathematical odds of any single name being picked are substantially equal." (Plan at 5). Thus, the Plan requires that names *within a single jury wheel* have a substantially equal chance of being drawn. As Congressman Traficant does not contend that names within a single wheel have anything other than a substantially equal chance of being picked, there is no reason to believe that the Plan was not administered according to its terms in this case.

2. The Congressman's Claims Are Time-Barred

As the Juror Selection Plan was complied with in this case, the Court turns **776* to Congressman Traficant's contention that the Plan violates the JSSA, the Fifth Amendment, and the Sixth Amendment.

Federal Rule of Criminal Procedure 12(b)(2) provides that "[d]efenses and objections based on defects in the indictment or information" must be raised prior to trial. Accordingly to the Sixth Circuit, this requirement applies to challenges to both grand and petit juries and both statutory and constitutional claims. In *United States v. Ovalle,* the Sixth Circuit held that "[f]ailure to raise an objection to the selection of the grand or petit jury prior to trial shall constitute waiver thereof" unless the defendant shows cause to excuse the failure. 136 F.3d 1092, 1107 (6th Cir.1998). The Court specifically stated that Rule 12(b)(2) governs untimely claims of discrimination in jury selection "even when such challenges are on constitutional grounds." *Id.*

In *United States v. Blair,* a defendant challenged jury selection under the JSSA and the Equal Protection Clause. Nevertheless, the Sixth Circuit stated, "it is clear that a defendant's failure to object to the composition of the grand jury prior to trial constitutes waiver of the argument." 214 F.3d 690, 699 (6th Cir.2000). The Court explained that, in order to show cause for the failure to make a timely objection, the defendant was required to "demonstrate an objective external factor that prohibited him from raising an objection to the jury selection plan prior to his trial." *Id.* at 700.

These Sixth Circuit decisions adhere to the rule established in *Shotwell Manufacturing Co. v. United States,* where the Supreme Court decided that a "challenge to the method of selecting the petit jury panel comes too late when not made before trial." 371 U.S. 341, 362, 83 S.Ct. 448, 9 L.Ed.2d 357 (1963).

In this case, Congressman Traficant raised entirely different challenges to jury selection prior to trial than those currently before the Court. On 14 January 2002, Defendant Traficant filed a motion for a venire selected from the entire Northern District of Ohio, rather than the Cleveland jury division, which the Court denied. (Docket # 128, 132). Jury selection began on 5 February 2002. On 6 February 2002, Congressman Traficant again objected to the jury selection process on the ground that jurors were not being selected from the entire Northern District of Ohio. (Docket # 180). The Court overruled this objection. (Docket # 183). On 11

February 2002 and 13 February 2002, he filed motions to dismiss the superseding indictment on the same ground and the additional ground that the amended Jury Selection Plan was approved by the Sixth Circuit after his original indictment was handed down. (Docket # 187, 192). These motions were denied. (Docket # 275). On 13 February 2002, Congressman Traficant filed an objection to the directions of the Court regarding peremptory challenges citing his confusion as to how the challenges were to be exercised. (Docket # 191). The objection was overruled by the Court. (Docket # 234).

In his reply, Defendant Traficant explicitly states that his current challenges to the Plan involve the alleged disparity between the odds of a Cleveland division voter and a Youngstown division voter being selected for jury service. This challenge is not a claim that Mr. Traficant was entitled to jurors from the Youngstown division and the rest of the district. In fact, the Congressman, through counsel, states, "The Government has again misrepresented Mr. Traficant's argument concerning the Plan--that he had a right to Youngstown jurors; that is not his argument." (Reply at 5). Thus, Congressman Traficant's current claims regarding the Plan were not raised *777 in any of his prior motions or objections. They were raised for the first time in the 23 April 2002 supplemental memorandum filed by counsel in support of his motion for a new trial. (Docket # 349). Because the statutory and constitutional claims now before the Court were raised over two months after the beginning of Congressman Traficant's trial, they are time-barred by Rule 12(b)(2) unless there has been a showing of cause and actual prejudice. Mr. Traficant has not presented, or even mentioned, any objective external factor that prohibited him from raising his current challenges to the Juror Selection Plan prior to his trial. Accordingly, the claims are barred by Rule 12(b)(2).

In addition, the JSSA claim is barred by the JSSA itself. 28

U.S.C. § 1867(a) provides,

In criminal cases, *before the voir dire examination begins,* or within seven days after the defendant discovered or could have discovered by the exercise of diligence, the grounds therefor, *whichever is earlier,* the defendant may move to dismiss the indictment or stay the proceedings against him on the ground of substantial failure to comply with the provisions of this title in selecting the grand or petit jury. (emphasis added). Section 1867(e) states, "[t]he procedures prescribed by this section shall be the exclusive means by which a person accused of a Federal crime ... may challenge any jury on the ground that such jury was not selected in conformity with the provisions of this title."

The Sixth Circuit has held that the timing "requirements of the statute are strictly enforced." *United States v. Young,* 570 F.2d 152 (6th Cir.1978). The Sixth Circuit has interpreted § 1867(a) to require that any motions based on a JSSA claim must "be filed prior to the voir dire examination at the latest." *Ovalle,* 136 F.3d at 1099, n. 10. *See also, United States v. De Alba-Conrado,* 481 F.2d 1266, 1269 (5th Cir.1973) (stating that "one who fails to assert challenges before or during voir dire is foreclosed from later tardy actions which attack the validity of the jury plan."); *United States v. Gross,* 375 F.Supp. 971, 979 (D.N.J.1974) (stating that "[t]he selection of petit and grand juries is governed by a single statutory provision ... which requires all objection to the method of the jury's selection to be raised prior to the voir dire."). The Sixth Circuit's view of § 1867(a) is consistent with that of the House Committee which conducted hearings on the JSSA. The Committee stated, "the bill sets time limitations upon the availability of challenges. Subsections (a), (b), and (c) specify that challenges must be offered before the voir dire begins." H.Rept. 1076, 90th Cong., 2d. Sess. p. 15, U.S.Code Cong. & Admin.News 1968, p. 1805.

Congressman Traficant first referred to the JSSA in his 11

February 2002 motion to dismiss the superseding indictment. (Docket # 187). At that time, he claimed that the Plan violated the JSSA because the Plan allowed for juries selected from a single jury division rather than from the entire Northern District of Ohio. This is not his current fair cross section claim. Moreover, even the 11 February 2002 motion was untimely because voir dire began on 5 February 2002.

Thus, Congressman Traficant's current JSSA fair cross section claim was first offered in his 23 April 2002 supplemental memorandum in support of his motion for a new trial. (Docket # 349). Because the claim was not raised before voir dire as required by § 1867(a), it is untimely. Relief, therefore, is not available under the JSSA.

Congressman Traficant's statutory and constitutional challenge to the Juror Selection Plan is untimely. Therefore, it cannot **778* support his motion for a new trial. Nevertheless, the Court will examine the merits of the Congressman's claims because he broadly asserts them as somehow affecting his constituents.

3. The Sixth Amendment and JSSA Fair Cross Section Claims

[6} In relevant part, the Sixth Amendment reads, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law ..." The Supreme Court has held that "the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial." *Taylor v. Louisiana,* 419 U.S. 522, 528, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975). Therefore, the "jury wheels, pools of names, panels, or venires from which juries are drawn must not systemically exclude distinctive groups in the community and therefore fail to be representative thereof." *Duren v. Missouri,* 439 U.S. 357, 363-64, 99 S.Ct. 664, 58 L.Ed.2d

579 (1979). The Sixth Amendment does not, however, impose a requirement that a petit jury actually "mirror the community and reflect the various distinctive groups in the population." *Taylor,* 419 U.S. at 538, 95 S.Ct. 692. The fair cross section requirement focuses on the jury pool, not the specific petit jury. The ideal embodied by the fair cross section requirement is a jury pool that "generally represent[s] the attitudes, values, ideas and experience of the eligible citizens that compose the community where the trial is taking place." *Barber v. Ponte,* 772 F.2d 982, 997 (1st Cir.1985)(en banc).

The fair cross section requirement is an integral part of the JSSA, as well. Section 1861 of the JSSA provides,

It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes. It is further the policy of the United States that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States.

28 U.S.C. § 1861. This policy is implemented by the requirement of section 1962 that "[n]o citizen shall be excluded from service as a grand or petit juror in the district courts of the United States ... on account of race, color, religion, sex, national origin, or economic status." 28 U.S.C. § 1862.

The language of the Sixth Amendment and of the JSSA recognizes the right of district courts to establish jury divisions within a district. The validity of jury divisions consistently has been acknowledged by federal courts. In *Ruthenberg v. United States,* 245 U.S. 480, 482, 38 S.Ct. 168, 62 L.Ed. 414 (1918), the Supreme Court held that "the plain text of the Sixth Amendment, the contemporary construction placed upon it by the Judiciary Act of 1789 ... and the continuous legislative and judicial practice from the beginning" authorize the drawing of a jury from a part of the district. A defendant in a criminal case has no right to jurors drawn from the entire district, no right to jurors drawn from a particular division, and no right to a trial held in a particular division. *See United States v. Davis,* 27 Fed.Appx. 592, 597-98, 2001 WL 1662485, *5 (6th Cir.2001)(holding that "there is no constitutional or statutory requirement that a defendant's trial take place in a specific courtroom or division within a federal judicial district" and that the jury pool need not include anyone from the division in **779* which the crime took place); *United States v. Herbert,* 698 F.2d 981, 984 (9th Cir.1983) (stating that "[a] petit jury may be drawn constitutionally from only one division and not the whole district."); *Zicarelli v. Dietz,* 633 F.2d 312, 316-18 (3d Cir.1980) (stating "there is no constitutional right to a jury chosen from the division where the offense was committed or from the entire district which includes that division."); *Zicarelli v. Gray,* 543 F.2d 466, 479 (3d Cir.1976); *United States v. Florence,* 456 F.2d 46, 49-50 (4th Cir.1972) (deciding that a defendant has no constitutional or statutory right to a jury selected from the entire district or from a particular division).

Congressman Traficant's Sixth Amendment and JSSA fair cross section claims manifest his two fundamental misunderstandings of the fair cross section requirement.

First, the basic premise of Congressman Traficant's fair cross section claims is that the Northern District of Ohio as a whole is the community to which the fair cross section requirement applies. This premise is incorrect. As the JSSA makes clear, defendants have the right to a petit jury "selected at random from a fair cross section of the community in the district *or* division." 28 U.S.C. § 1861 (emphasis added). Because the Northern District of Ohio is divided into four jury divisions by the Plan, as approved by the Sixth Circuit Judicial Council, Defendant Traficant has the right to a jury selected from a fair cross section of the Cleveland jury division. Because the fair cross section requirement applies *within* jury divisions, not *between* jury divisions, Mr. Traficant's claim of geographic under-representation of Youngstown division voters fails. The Youngstown jury division is not a group *within* a community; it *is* a community. If the fair cross section requirement applied to entire districts, jury divisions, which have been upheld as valid time and time again by federal courts, would be unworkable because jurors would have to be randomly selected from a fair cross section of the entire district.

Second, although Congressman Traficant purports to present a fair cross section claim under the JSSA and Sixth Amendment, as well as a Fifth Amendment equal protection claim, the only claim he is actually bringing is an equal protection claim. Defendant Traficant's case was randomly assigned to this Court in the Cleveland jury division. [FN17] As a result, like every other defendant assigned to a judge holding court in Cleveland, the Congressman's petit jury venire was drawn from the Cleveland jury division. Because Youngstown division voters do not serve on Cleveland division juries, any disparity in the chances of a Cleveland division voter and a Youngstown division voter being selected for jury service has no impact whatsoever on Congressman Traficant's venire. Moreover, Congressman Traficant now explicitly states that he is not claiming that Youngstown division voters should have been on his venire. (Reply at 5). A fair cross section claim focuses on the defendant's jury venire. By contrast, Congressman Traficant's claim is not about the representativeness of his venire. His claim actually focuses on the rights of prospective jurors in the Youngstown division. Thus, the Congressman's claims styled as fair cross section claims are actually equal protection claims. Equal protection claims cannot properly be brought under the JSSA or Sixth Amendment. [FN18]

FN17. The Cleveland jury division includes the following nine counties: Ashland, Ashtabula, Crawford, Cuyahoga, Geauga, Lake, Lorain, Medina, and Richland.

FN18. The Sixth Amendment focuses on a defendant's right to a fair trial by an impartial jury. Equal protection concerns are embodied by the Fifth Amendment Due Process Clause and Fourteenth Amendment Equal Protection Clause.

***780** Even if the defendant's fair cross section claims were not time-barred and even if they did not rely on fundamental misunderstandings of the fair cross section requirement, the claims would fail because Congressman Traficant cannot present a prima facie case.

"Typically, challenges brought under the JSSA are reviewed under the same standard as a Sixth Amendment claim of denial of a jury representing a fair cross section of the community." *Ovalle,* 136 F.3d at 1099. *See also United States v. Brown,* 230 F.3d 1360, 1365 (6th Cir.2000); *United States v. Conant,* 116 F.Supp.2d 1015, 1023 (E.D.Wis.2000) (stating that "the inquiry for evaluating a claim under the Sixth Amendment is identical to the inquiry for evaluating a claim under the Jury Selection and Service Act."). In order to show a prima facie violation of the fair cross section requirement under the JSSA or Sixth Amendment,

the defendant must show (1) that the group alleged to be

> excluded is a "distinctive" group in the community, (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Duren v. Missouri, 439 U.S. 357, 364, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979). [FN19] If a defendant fails to establish any of these elements he has failed to establish a prima facie violation of the fair cross section requirement.

FN19. *See also Davis,* 27 Fed.Appx. at 597-98; *Ovalle,* 136 F.3d at 1098, n. 7; *Ford v. Seabold,* 841 F.2d 677, 681 (6th Cir.1988).

Congressman Traficant cannot satisfy the first element of the prima facie case because he cannot show that the group alleged to be excluded, prospective jurors in the Youngstown division, are a "distinctive," or cognizable, group.

In *Ford,* the Sixth Circuit adopted the following test for determining whether a group is distinctive for fair cross section purposes:

> (1) that the group is defined and limited by some factor (i.e., that the group has a definite composition such as by race or sex); (2) that a common thread or basic similarity of attitude, ideas, or experience runs through the group; and (3) that there is a community of interest among members of the group such that the group's interests cannot be adequately represented if the group is excluded from the jury selection process.

841 F.2d at 681-82. Groups found to be distinct by federal courts include African-Americans, women, Mexican-Americans, the less educated, daily wage earners, Native Americans, and Jewish persons. *See Lockhart v. McCree,* 476 U.S. 162, 175, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986); *Taylor v. Louisiana,* 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d

690 (1975); *Barber,* 772 F.2d at 1002; *United States v. Butera,* 420 F.2d 564 (1st Cir.1970).

Federal courts consistently have found that residents of a geographic area are not a distinct, cognizable group based on their place of residence alone.

In *United States v. Conant,* 116 F.Supp.2d 1015 (E.D.Wis.2000), the defendant argued that the juror selection plan of the Eastern District of Wisconsin violated the fair cross section requirement because jurors were selected exclusively from the seven counties of the Milwaukee Division. Between 1981 and 2000, only one federal petit jury was drawn from the twenty-one counties of the Green Bay Division. ***781** *Id.* at 1018. In analyzing the claim, the District Court noted that "every court that has looked at the question of whether the residents of a geographic area may constitute a 'distinctive' group for Sixth Amendment purposes solely due to the location of their residence has answered negatively." *Id.* at 1024. In concluding that the Green Bay Division was not a distinctive group, the Court refused "to equate residents of the Green Bay Division with large groups such as African-Americans, Hispanics, and women." *Id.* at 1025.

The decision by the district court in *Conant* was consistent with the Seventh Circuit's opinion in *United States v. Raszkiewicz,* 169 F.3d 459 (7th Cir.1999). As in *Conant,* the defendant in *Raszkiewicz* challenged the Eastern District of Wisconsin jury selection plan. The Seventh Circuit rejected the fair cross section challenge to the plan even though the administration of the plan excluded all Native Americans who lived in the six reservations of the district, all of which were situated in the Green Bay Division. *Id.*

In *United States v. Test,* the juror selection plan of the District of Colorado was at issue. 550 F.2d 577 (10th Cir.1976). The district was divided into three divisions: the Denver, Pueblo, and Grand Junction divisions. *Id.* at 582, n. 4. The defendants alleged that the fair cross section requirement had been violated because every fiftieth name from the Grand Junction division was placed in the master jury wheel, while every seventy-fifth name from the other two divisions was placed in the wheel. *Id.* at 582. The Tenth Circuit's response to the challenge made clear that a geographic area is not a distinct group:

Mere geographical imbalance, absent evidence that an identifiable and cognizable segment of the community has been systemically excluded or underrepresented by reason of such imbalance, does not violate the statutory and constitutional requirement that the jury panel represent a fair cross section of the community.

Id. (internal quotation marks omitted). The holding demonstrates the distinction between a "geographic imbalance" and a "cognizable segment of the community." The defendants in *Test* also alleged that "the plan effectively excludes from petit jury service all persons who reside in the Pueblo and Grand Junction divisions, because the vast majority of the trials in this district are held in the Denver division." *Id.* at 594. The Tenth Circuit rejected this claim, as well, stating that "the partitioning of a district into jury divisions is sanctioned by the [JSSA] and is clearly not unconstitutional, absent evidence that some cognizable group has been systematically excluded by 'gerrymandering' the division lines." *Id.*

Similarly, in *United States v. Butera,* the defendant contended that the fair cross section requirement was violated by the under-representation of residents of several Maine counties in his jury pool. 420 F.2d 564 (1st Cir.1970). The First Circuit declared that the counties were not a distinct group, stating "we are not aware that residents of counties can be said to hold views and attitudes which are in any way 'distinct' from those of their neighbors in nearby counties." *Id.* at 572.

The defendant in *United States v. Foxworth,* 599 F.2d 1 (1st Cir.1979), challenged the District of Massachusetts' system of grand juror selection on fair cross section grounds. Foxworth provided evidence that twenty four cities and towns in the Eastern Division of the district were not represented in the 1977 master jury wheel. *Id.* at 2. The First Circuit concluded that Foxworth had not presented a prima facie case, noting that "it can hardly be asserted that the registered voters in a **782* given city or town are sufficiently 'distinct' to constitute a cognizable group." *Id.* at 4. The court explained, "we cannot see that the views and attitudes of voters of one city or town are in any way 'distinct' from those of voters in a neighboring community." *Id.* at 4, n. 4.

Even before the enactment of the JSSA, the Second Circuit held that it was permissible for the Southern District of New York to draw its jurors exclusively from the Counties of Westchester, Bronx, and New York even though eight other counties were not represented in the jury pool at all. *See United States v. Gottfried,* 165 F.2d 360 (2d Cir.1948); *United States v. Kelly,* 349 F.2d 720 (2d Cir.1965).

Thus, it is well-established that the residents of geographic areas are not distinct, cognizable groups based on their place of residence alone. In some of the cases discussed above, federal courts held that the fair cross section requirement is not violated by even the total exclusion of residents of divisions, counties, and municipalities from the juror selection process.

For the residents of a geographic area to qualify as a cognizable group for jury selection purposes, geography must be a proxy for another, recognized distinct group. In *Zicarelli v. Dietz,* the Third Circuit suggested that the fair cross section requirement might "preclude exclusion of a geographic group when the group is profoundly culturally distinct." 633 F.2d 312, 321 (3d Cir.1980). This Court found only two cases in which this condition was met.

In *Alvarado v. State,* the Alaska Supreme Court found Alaska's juror selection system for the third judicial district to be violative of the fair cross section requirement. 486 P.2d

891 (Alaska 1971). Because all prospective jurors for the state judicial district were drawn from the area within a radius of fifteen miles of Anchorage, all but one of the 55 Native villages in the district were excluded from jury service. *Id.* at 892, 895. In deciding that the fair cross section requirement was not met, the Alaska Supreme Court focused on the "very profound cultural differences" between the Native villages and urban Anchorage. *Id.* at 894. The court stated,

> The evidence vividly portrays the enormous gulf which separates the mode of life of the typical Alaskan villager from the type of existence led by most residents of Anchorage and other cities of the state. The differences between a Native village and the City of Anchorage are neither simple nor superficial; they are not restricted to a single element such as occupation or income. Rather, the lines of separation are profound and intersect areas including occupation, economy, domestic relations, politics, language, religion, race, cultural heritage, and geography.

Id. at 899. In other words, the jury pool did not reflect a fair cross section of the third judicial district community because Native Alaskans, with their profoundly different culture and way of life, were almost completely excluded from the jury pool by the geographic restrictions of the juror selection system.

Similarly, in *United States v. Tranakos,* the defendants challenged the District of Wyoming's juror selection plan on the ground that it excluded from grand jury service residents of nineteen counties. 690 F.Supp. 971 (D.Wyo.1988). The defendants demonstrated that Shoshone and Arapaho Indians, who lived on the Wind River Reservation, were entirely excluded from jury service because the reservation was outside the geographic area from which all grand jurors were summoned. *Id.* at 973. The District Court found that "the Shoshone and Arapaho are manifestly a cognizable group, with unique ideas, values, customs and culture." *Id.* at

976. The court concluded that "they cannot be left out of the grand jury draw without **783* loss to the community." *Id.* Thus, in *Tranakos,* the complete exclusion of a geographic area (nineteen counties) from grand jury selection violated the fair cross section requirement because the geographic area included all of the members of a culturally unique cognizable group in Wyoming (the Shoshone and Arapaho Indians).

The cases cited by Congressman Traficant do not support the proposition that geographic areas are distinct groups for jury selection purposes. The Congressman cites three cases: *Thiel v. Southern Pacific Co.,* 328 U.S. 217, 66 S.Ct. 984, 90 L.Ed. 1181 (1946); *United States v. Osorio,* 801 F.Supp. 966 (D.Conn.1992); and *United States v. Jackman,* 46 F.3d 1240 (2d Cir.1995).

In *Thiel,* the Supreme Court found that the clerk of court and the jury commissioner of the Federal District Court in San Francisco "deliberately and intentionally excluded from the jury lists all persons who work for a daily wage." 328 U.S. at 221, 66 S.Ct. 984. The Court was concerned with discrimination "against persons of low economic and social status" because it could "establish the jury as the instrument of the economically and socially privileged." *Id.* at 223, 66 S.Ct. 984. Thus, the Supreme Court held that exclusion of all those who earn a daily wage could not be justified by law. *Id.* at 222, 66 S.Ct. 984. In so holding, the Court stated,

The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community. This does not mean, of course, that every jury must contain representatives of all economic, social, religious, racial, political and geographical groups of the community; frequently such complete representation would be impossible. But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups.

Id. at 220, 66 S.Ct. 984. It is this reference to geographical groups that Congressman Traficant emphasizes.

This single, isolated reference to geographical groups does not support Congressman Traficant's position that such groups are distinct groups for fair cross section purposes. *Thiel* related to daily wage earners, not geographic groups. When viewed in its entirety, the opinion is imbued with concerns of economic and social classes, not with residents of particular geographic areas. Moreover, every case discussed above and cited for the proposition that residents of a geographic area are not a distinct group for fair cross section purposes was decided after *Thiel.* None of the circuit or district courts in those cases found _Thiel_ to be applicable to claims based on geography.

In addition, a few courts have specifically addressed _Thiel's_ non-applicability to geography-based claims. Just two years after _Thiel_ was decided, the Second Circuit examined the passage from _Thiel_ in _United States v. Gottfried, 165 F.2d 360 (2d Cir.1948)_. Judge Learned Hand opined that _Thiel_ may well forbid the officials who draw up the lists from excluding any part of the district *at their own choice.* We assume that they may not do so; but if they do not, "geographical" uniformity is satisfied, for the district and circuit courts have had power since the first Judiciary Act of 1789 to divide a district territorially in the interest of an impartial trial, of economy, and of lessening the burden of attendance. There cannot be the faintest question of the constitutionality of this statute; the courts have again and again recognized its validity.

_Id. at 364_ (emphasis added). Thus, according to Judge Hand, _Thiel_ prohibits ***784** discretionary discrimination by individual court officials, not the under-representation of residents of geographic areas by a juror selection plan.

Similarly, in _Zicarelli v. Dietz,_ the Third Circuit rejected Congressman Traficant's overly-broad reading of _Thiel._ _633 F.2d 312 (3d Cir.1980)_. The Court stated, Nothing in the Thiel case itself supports that argument since the facts of that case involved exclusion of laborers who worked for a daily wage. There is manifestly a higher cohesion of interest among day laborers, who may be considered to represent an economic class, than among those brought together by the mere coincidence of the geographic unit where they live.

Id. at 317.

The second case cited by Congressman Traficant is *United States v. Osorio*, 801 F.Supp. 966 (D.Conn.1992). *Osorio* involved a claim that African-Americans and Hispanics were under-represented in the master jury wheel of the Hartford division of the District of Connecticut. Residents of New Britain and Hartford, the two largest cities in the division, were completely excluded from venires. *Id.* at 972. The District Court focused on the fact that "these two cities combine to account for 62.93% of the voting-age black population and 68.09% of the voting-age Hispanic population in the Division." *Id.* The Court did not address the issue of whether the residents of the cities were a distinct group because the fair cross section claim was based on race and ethnicity, not geography. The Court noted, "There is little question ... that both blacks and Hispanics are 'distinctive' groups in the community for purposes of this analysis." *Id.* at 977. Thus, this case does not stand for the proposition that residents of a geographic area can be a cognizable group.

Finally, Congressman Traficant cites *United States v. Jackman*, 46 F.3d 1240 (2d Cir.1995). *Jackman* also involved the juror selection system in the Hartford Division. The Second Circuit found that the master jury wheel determined to be unconstitutional in *Osorio* was still being used by the jury commissioner. *Id.* at 1245. The relevant circumstances of the case were the same as those in *Osorio.* The Court did not discuss whether residents of New Britain and Hartford were a distinct group for fair cross section purposes because the defendant's claim was based on race and ethnicity, not geography.

In this case, Congressman Traficant cannot meet the first element of the prima facie case of a fair cross section claim, that the group alleged to be excluded is a distinctive group in the community. Mr. Traficant contends that the residents of the Youngstown jury division are a cognizable group that must not be under-represented on venires in the Northern District of Ohio. Yet, the numerous cases discussed above demonstrate that geography alone is not enough to establish the distinctiveness of a group of residents. Exclusion of a geographic area from the jury pool might violate the fair cross section requirement where the residents of the geographic area are profoundly culturally distinct, as the Native Alaskans were in *Alvarado* and the Shoshone and Arapaho were in *Tranakos*. Here, Congressman Traficant brings a challenge based purely on geography--the alleged under-representation of the residents of the Youngstown jury division. [FN20] The Congressman does not assert, or even hint at, any profound cultural distinctiveness ***785** of the residents of the division. [FN21] Thus, his fair cross section claims under the JSSA and Sixth Amendment would fail as a matter of law because he cannot meet the first element of a prima facie case. [FN22]

FN20. In his reply brief, Mr. Traficant explicitly states, "The N.D. Ohio Plan, the JSSA, and the Fifth and Sixth Amendment [sic] all preclude a procedure where a person has a substantially greater chance of being called for jury duty merely by reason of their [sic] place of residence. It is this disparity in the N.D. Ohio Plan that is being challenged here." (Reply at 5).

FN21. In his reply brief, Congressman Traficant does state, the goals of the JSSA and the Fifth and Sixth Amendment [sic] would be subverted if a jury selection plan may lawfully systemically exclude a group of cities within a division. A city with a large ethnic or racial minority population can be unfairly discriminated against. For example, the City of Youngstown, which is heavily populated by ethnic and racial minorities, can be systematically excluded on grounds that the geographic origin discrimination is legal, while suburban residents having very small minority populations have greater opportunities to serve on juries. (Reply at 8). However, this isolated paragraph cannot be interpreted as an assertion of the profound cultural distinctiveness of the Youngstown jury division. An assertion of he presence of ethnic or racial minorities in one portion of the Youngstown division and the relative absence of such a population in one portion of the Cleveland jury division does not amount to a claim that a substantial cultural gulf separates the two divisions.

FN22. As Congressman Traficant cannot meet the first element of the prima facie case, the Court will not examine the second and third elements. Dr. Deborah Wasserman's affidavit is not examined because it addresses the second element--a disparity that is not fair and reasonable.

In summary, Congressman Traficant's fair cross section claims under the JSSA and Sixth Amendment fail for four reasons. First, the claims are time-barred. Second, the fair cross section requirement applies within jury divisions, not between jury divisions. Third, the Congressman's fair cross section claims are actually equal protection claims, which cannot properly be brought under the JSSA or Sixth Amendment. Fourth, the Congressman cannot meet the first element of a prima facie case for a fair cross section violation.

4. The Fifth Amendment Equal Protection Claim

Congressman Traficant also contends that the Plan violates the equal protection component of the Due Process Clause of the Fifth Amendment. It is unclear whether he is attempting to bring this claim on his own behalf, on behalf of Youngstown division residents, or both. In his reply brief, Congressman Traficant asserts, "The Plan used in Congressman Traficant's trial discriminates against Youngstown Division residents ... of which Mr. Traficant is one." (Reply at 11). Essentially, Congressman Traficant's claim is that the Plan discriminates against Youngstown division residents because they allegedly have a smaller chance of being called for jury duty than Cleveland division residents.

As discussed above in Section E.2., this claim is time-barred. Moreover, to the extent that Mr. Traficant seeks to bring an equal protection claim on behalf of Youngstown division residents, he has not shown or even asserted his standing to do so. [FN23]

FN23. Although there is precedent to support the view that a defendant in a criminal case has third party standing to bring the equal protection claims of individuals excluded from jury service, these cases all involve claims of racial discrimination. *See* *Powers v. Ohio,* 499 U.S. 400, 410-15, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991); *Campbell v. Louisiana,* 523 U.S. 392, 118 S.Ct. 1419, 140 L.Ed.2d 551 (1998); *United States v. Ovalle,* 136 F.3d at 1104. Presumably, any discrimination on the basis of geography is not nearly as invidious or damaging to the criminal justice system as discrimination on the basis of race. It is, therefore, unclear whether Congressman Traficant meets the injury in fact requirement for third party standing.

***786** Even if the equal protection claim was not time-barred, and assuming that Congressman Traficant could somehow show that he has standing to bring the claim, the equal protection challenge would fail because he cannot establish a prima facie case.

The prima facie case for an alleged equal protection violation in the context of juror section was set forth by the Supreme Court in *Castaneda v. Partida*, 430 U.S. 482, 494, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977). The Court explained, the defendant must show that the procedure employed resulted in substantial underrepresentation of his race or of the identifiable group to which he belongs. The first step is to establish that the group is one that is a recognizable, distinct class, singled out for different treatment under the laws, as written or as applied. Next, the degree of underrepresentation must be proved, by comparing the proportion of the group in the total population to the proportion called to serve as ... juror, over a significant period of time ... Finally ... a selection procedure that is susceptible [to] abuse or is not racially neutral supports the presumption of discrimination raised by the statistical showing.

Id. These elements were reiterated in *Ford v. Seabold*, 841 F.2d at 688, *Jefferson v. Morgan*, 962 F.2d 1185, 1188-89 (6th Cir.1992), and *Ovalle*, 136 F.3d at 1104.

The first element of an equal protection prima facie case--the existence of a distinct, cognizable group--is the same as that for a fair cross section claim. *See* *Test*, 550 F.2d at 596, n. 7 (stating that the "cognizability requirement has been consistently reaffirmed by the Supreme Court in cases involving fifth and sixth amendment challenges."); *Herbert*, 698 F.2d 981, 984 (9th Cir.1983) (observing that "[t]he test for a constitutionally selected jury is the same, whether challenged under the fifth and sixth amendments of the Constitution or under the [JSSA]."); *United States v. Underwood*, 617 F.Supp. 713, 719 (D.C.Ala.1985) (stating that "the equal protection analysis employs a prima facie test virtually identical to the one used in the fair-cross section analysis.").

For the reasons discussed above in section E.3., Congressman Traficant cannot demonstrate that the residents of the Youngstown division are a distinct, cognizable group. Geography alone is not enough to establish distinctiveness. Thus, even if it were not time-barred, Congressman Traficant's equal protection challenge could not succeed because the Congressman cannot meet the first element of the prima facie case for an equal protection challenge to the Plan.

5. Conclusion

Congressman Traficant's challenge to the Juror Selection Plan of the Northern District of Ohio under the JSSA, Sixth Amendment, and Fifth Amendment fails as a matter of law. Each of the claims is time-barred. Moreover, each of the claims fails on the merits. A hearing on the matter is unnecessary as Congressman Traficant's claims fail as a matter of law and he has presented no allegations that, even if proven true, would entitle him to relief. The use of the Juror Selection Plan of the U.S. District Court for the Northern District of Ohio in this case does not entitle Congressman Traficant to a new trial.

III. CONCLUSION

For the reasons set forth above, the interests of justice would not be served by granting Congressman Traficant's motion for a new trial. The alternative relief sought by Congressman Traficant under Rule 34, an arrest of the judgments of guilty against him, is inappropriate because the superseding indictment charges ***787** several offenses, over which the Court has jurisdiction.

Accordingly, Congressman Traficant's motion for a new trial is denied.

IT IS SO ORDERED.

N.D.Ohio,2002.

U.S. v. Traficant

209 F.Supp.2d 764

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

JUROR SELECTION PLAN

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A. DEFINITIONS

1. As used in this plan, the word "divisions" shall mean the division established in the section herein captioned "Applicability of Plan".

2. The words used in this plan, which are defined in Section 1869 of the Act, as amended, shall have the meaning therein specified.

3. Whenever the phrase "voter's list(s)" or "list of voters" is used in this Plan, it shall be intended to mean names obtained from the official registration lists as provided in Ohio Revised Code Section 3503.27.

B. APPLICABILITY OF THE PLAN

The Northern District of Ohio is hereby divided, for jury selection purposes, pursuant to Title 28 U.S.C. 1869(e), as follows:

Eastern Division, at Akron, consisting of the counties of:

Garroll
Holmes
Portage
Stark
Summit
Tuscarawas
Wayne

Eastern Division, at Cleveland, consisting of the counties of:

Ashland
Ashtabula
Crawford
Cuyahoga
Lake
Lorain
Medina
Richland

Geauga

Eastern Division, at Youngstown, consisting of the counties of:
Columbiana
Mahoning
Trumbull

Western Division, at Toledo, consisting of the counties of:

Allen
Auglaize
Defiance
Erie
Fulton
Hancock
Hardin
Henry
Huron
Lucas
Marion
Mercer
Ottawa
Paulding
Putnam
Sandusky
Seneca
Van Went
Williams
Wood
Wyandot

The provisions of this plan apply to all divisions in the Northern District of Ohio, unless specifically indicated to the contrary, by written order of the Court

C. DECLARATION OF POLICY

It is the policy of the Court that all litigants in this Court, entitled to trial by jury, shall have the right to grand and petit juries selected at random from a fair cross section of the community in each division wherein the Court convenes and that all citizens resident within the District shall have the opportunity to be considered for service on grand and petit juries and shall have an obligation to serve as jurors when summoned for that purpose.

D. DISCRIMINATION PROHIBITED

No citizen shall be excluded from service as a grand or petit Juror In this Court on account of race, color, religion, sex, national origin or economic status.

E. MANAGEMENT AND SUPERVISION OF THE JURY SELECTION PROCESS

1. The Clerk of Court shall manage the jury selection process under the supervision and control of the Chief Judge.

2. In this plan, "Clerk" and "Clerk of Court" shall mean not only the Clerk of the District Court of the United Slates, any authorized deputy clerk, but also any other person authorized by the court to assist the clerk in the performance of functions under this chapter. (28 U.S.C. 1869(a), as amended.)

F. JURY SELECTION SOURCES.

1. The Judges of the Court find that the sources from which the names of grand and petit jurors shall be selected at random shall be from the general election voter registration lists, it appearing to the Court that section 3503.06 of the Ohio Revised Code provides in part that "no person shall be entitled to vote at any general election ... unless he is registered as an elector." It is the opinion of the Court that electors registered to vote at general elections in this District represent a fair cross-section of the community in the Northern District of Ohio. Accordingly, the names of grand and petit jurors selected for service in this Court in the refilling of the master and qualified jury wheels following each presidential

election, shall be selected at random from the Official Registration Lists. (Whenever the phrase "voter's list(s)" or "list of voters" is used in this Plan, it shall be

H. METHOD AND MANNER OF RANDOM SELECTION.

1. At the clerk's option, and after consultation with the Chief Judge, the selection of names from a complete source list database in electronic media for the master jury wheel maybe accomplished by *a* purely randomized process through routines approved by the National Institute of Standards and Technology (NIST). Similarly, at the option of the clerk and after consultation with the court, a properly programmed electronic data processing system for pure randomized selection may be used to select names from the master wheel for the purpose of summoning persons to serve as grand or petit jurors. Such random selections of names from the source list for inclusion in the master wheel by data computer personnel must insure that each county within the jury division is substantially proportionally represented In the master jury wheel in accordance with 28 USC Sec 1863 (b)(3). The selections of names from the source list and the master wheel must also insure that the mathematical odds of any single name being picked are substantially equal.

I. AUTOMATED SELECTION OF NAMES

1. The Judges of the Court have determined that electronic data processing shall be used for selecting and copying names from the master file of registered voters of the Secretary of State of Ohio who maintains this list In electronic machine readable form, such as

punched cards, magnetic tapes, or magnetic discs.

2. The Judges further find that if not all counties are included on said Master File of the Secretary of State at the time the Clerk fills the Master Jury Wheels of this Court, It may be advantageous to employ a combination of methods whereby names are initially selected from the voters lists manually and then recorded on punched cards and tapes for subsequent handling and copying of these names by electronic machine methods.

3. Therefore, a properly programmed electronic data processing system or a combination system employing both manual and electronic machine methods may, at the Clerk's option and after consultation with the Chief Judge, be used to select master wheel names from voter lists of any or all counties in the District, provided that the required proportions of names from each county are maintained and that the above described random selection method is followed.

4. Similarly, the Judges of the Court find that an electronic data processing system or a combination electronic and manual system may, at the option of the Clerk and the Chief Judge, be used to select names from the qualified wheel of persons to be summoned to serve as grand or petit jurors, and for the recording of names of prospective jurors on any papers and records needed by the court to administer the selection, and payment of jurors.

5. If the court elects to use electronic machine methods In connection with any or all of the district's voter records, source lists, master jury wheels, or qualified jury wheels, the name selection shall be planned and

programmed according to a random selection method formula. If the court uses a manual system for drawing names from any division's master or qualified wheel(s), the name shall be randomly drawn by lot.

J. MAINTAINING MASTER JURY WHEELS

1. The Clerk shall maintain jury wheels for each of the divisions within the District. The names and addresses of all persons randomly selected from the lists of voters at the last presidential general election shall be placed in the master jury wheel for that division. The physical form of record on which names for the master wheel(s) are kept may include such electronic data storage devices as punched cards, magnetic tapes, or magnetic disc files. Pursuant to Section 1863(b)(4) of the Act, the minimum number of names to be placed in the master jury wheel(s) shall be at least 1/2 of 1% of the total number of names on all county voter lists.

2. The Clerk shall cause the lists obtained to be placed in the master wheel computer where these names will be first alphabetized and then numbered. Thereafter, a list will be prepared for each master wheel of the number, name, and post office address of each person on each master wheel. These lists will be maintained In the appropriate office of the Clerk. That Is, the lists of the numbers, names, and addressees of the prospective jurors on the master jury wheel at Cleveland will be maintained in the Office of the Clerk at Cleveland; the master list for Akron will be kept at the Akron Office; the master list for Youngstown will be kept at the Youngstown Office; and, the master list for Toledo will be kept at the Office of the Clerk at Toledo.

3. Thereafter, the Clerk shall determine the number of prospective jurors required for qualification to fill the qualified jury wheels at each seat of Court and shall direct that the computer randomly select that number of names from among all the names in the master jury wheels. An alphabetical list of the names so selected shall be prepared, together with the necessary index cards, and the Juror questionnaires on the official forms prescribed by the Director of the Administrative Office of the United States Courts. Thereafter, the Clerk shall cause the questionnaires to be mailed to all prospective jurors so drawn. The questionnaires of prospective jurors to be qualified for service at Cleveland will be returned to the Office of the Clerical Cleveland; The questionnaires of prospective Jurors to be qualified for service at Akron will be returned to the Office of the Clerk at Akron; The questionnaires of prospective jurors to be qualified for service for Youngstown will be returned to the Office of the Clerk at Youngstown; And, the questionnaires of prospective jurors to be qualified for service at Toledo will be returned to the Office of the Clerk at Toledo.

4. Thereafter, when additional names are required to refill the Qualified Jury Wheels of this Court, the Clerk shall cause names to be randomly selected by the computer from the master jury wheels and questionnaires to be mailed, as provided above.

5. The minimum number of names to be placed in the master jury wheels will be as follows:

Eastern Division at Akron	18,000
Eastern Division at Cleveland	32,000
Eastern Division at Youngstown	12,000
Western Division at Toledo	18,000

The Court finds that the number of names prescribed above, in each division, exceeds one-half of one percent of the number of electors voting in the last general election.

6. The Chief Judge may order additional names to be placed in the master jury wheels from time to time, as necessary and in accordance with the formula herein above described. The master jury wheels currently in full force and effect shall be emptied and refilled every four years, not later than September 1, of the year following a general presidential election.

7. Pursuant to 28 U.S.C. Section 1878, at the option of the district court, jurors may be qualified and summoned in a single procedure, in lieu of two separate procedures otherwise provided for by the Jury Section and Service Act and this Plan.

K. DRAWING OF NAMES FROM THE MASTER JURY WHEELS: COMPLETION OF JUROR QUALIFICATION FORMS.

1. The Clerk, either all at one time or at periodic intervals, shall publicly draw at random from the master jury wheels the names of as many persons as maybe required to maintain an adequate number of names In the qualified jury wheels. The number of names to be drawn shall be determined by the Clerk based upon anticipated juror demands by the Court plus a margin of extra names sufficient to compensate for the estimated number that will turn out to be unavailable or ineligible.

2. The Clerk shall have prepared alphabetized lists of names drawn. These lists shall not be exhibited to any person except as provided herein and in Sections 1867 and 1868 of the Act, as amended. The Clerk shall prepare and have mailed to every person whose name is so drawn, a juror qualification questionnaire form, accompanied by instructions to execute and return the questionnaire duly signed and sworn, to the Clerk by mail within ten (10) days, in accordance with Section 1864(a) of the Act, as amended.

3. Any person who fails to return a completed juror qualification form as instructed may be summoned forthwith to appear to fill out a juror qualification form.

L EXCUSES ON INDIVIDUAL REQUEST

The Judges of this Court hereby find that jury service by members of the following occupational classes or groups of persons would entail undue hardship or extreme inconvenience to the members thereof, and the excuse of such members will not be inconsistent with the Act and shall be granted upon individual request:

1. Persons over 70 years of age.

2. Persons who have, within the past two years, served on a federal grand or petit jury.

3. Persons having active care and custody of a child or children under 10 years of age whose health and/or safety would be jeopardized by their absence for jury service; or a person who Is essential to the care of aged or Infirm persons.

4. Any person whose services are so essential to the operation of a business, commercial, or agricultural enterprise that said enterprise must close if such person were required to perform jury duty.

5. Persons active in professional occupations, such as clergymen, physicians, dentists, nurses and attorneys.

6. Persons who serve without compensation as volunteer safety personnel, such as firefighters or members of a rescue squad or ambulance crew for a public
agency.

M. TEMPORARY EXCUSES

Pursuant to 28 U.S.C. 1866(c), as amended by Section 801 of Title VIII of HR. 4807, temporary excuses on the grounds of undue hardship or extreme inconvenience may be granted by the court, and under the court's supervision, by the clerk of court The names of individuals temporarily excused shall be reinserted into the qualified jury wheel for possible resummoning.

N. EXEMPTION FROM JURY SERVICE

1. The court hereby finds that exemption of the following groups or persons or occupational classes is in the public interest and would not be inconsistent with the Act, and, accordingly, members of such groups are exempt from Jury service:

   (a) Members in active service in the Armed Forces of the United States.

(b) Members of the fire or police departments of any state, district, territory, possession or subdivision thereof. (It is the sense of the Court that this category does not include members of volunteer fire departments or part-time policemen or constables who have other employment.)

(c) Public officers in the executive, legislative or judicial branches of the government of the United States, or any state, district, territory or possession or subdivision thereof who are actively engaged in the performance of official duties. Public officer shall mean a person who is either elected to public office or who is directly appointed by a person elected to public office.

O. QUALIFICATIONS FOR JURY SERVICE

1. The Miscellaneous Duty Judge at each location of holding court, on his/her initiative or upon recommendation of the Clerk, shall determine solely on the basis of the information provided on the juror qualification questionnaire, and other competent evidence, whether a person is unqualified, exempt, or Is to be excused from jury service. The Clerk shall enter such determination in the space provided on the juror qualification questionnaire and the alphabetical list of names drawn from the master jury wheel. If a person did not appear in response to a summons, such fact shall be noted on said list and If any person fails to return a completed juror questionnaire form as instructed, the Clerk shall thereupon pursue the matters each and all in accordance with the provision of Section 1864 of the Act, as amended.

2. In making such a determination, the District Judge shall

deem any person qualified to serve on grand and petit juries in this District unless the person:

(a) is not a citizen of the United States eighteen (18) years old who has resided for a period of one year within the judicial district;

(b) is unable to read, write, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form;

(c) is unable to speak the English language;

(d) is incapable, by reason of mental or physical infirmity, to render satisfactory jury service; or

(e) has a charge pending against him/her for the commission of, or has been convicted in a State or Federal Court of record of a crime punishable by imprisonment for more than one year and his/her civil rights have not been restored by pardon or amnesty.

P. QUALIFIED JURY WHEEL

1. The Clerk shall maintain separate qualified jury wheels for each division in the District and shall place in such wheels the names of all persons drawn from the master Jury wheel and not disqualified, exempt, or excused pursuant to this plan. The Clerk shall insure that at all times an adequate number of names are contained in each such jury wheel. An order for a group of jurors to be summoned will be directed to the computer center with Instructions to follow the random selection method in the selection of those persons and the recording of their names and addresses on the summons forms.

2. The computer center will also be instructed to prepare an alphabetized list of persons summoned. These lists shall not be exhibited to any person except as provided herein and in Section 1867 & 1868 of the Act, as amended.

3. Completed summons forms, at the option of the Clerk of the Court, may be mailed to jurors by the Clerk's Office, or at the option of the Clerk, by the computer center or by a commercial mailing service.

4. a.. Names drawn from the qualified jury wheel or petit jury shall not be made public
   until the jurors have been summoned and have appeared at the courthouse,
   provided that any district judge may order the names to be kept confidential in
   any case creases when the Interests of justice so require.

   b. Names drawn from the qualified jury wheel for grand jury shall not be made public, except upon order of the Court.

5. The qualified jury wheels shall be emptied and refilled every four years, not later than December 1, of the year following the year of a general presidential election.

Q. PUBLIC ANNOUNCEMENT OF THE PLACE AND TIME OF AUTOMATED SELECTION OF NAMES BY COMPUTER CENTER

1. The office of the Clerk of Court shall retain, and when requested, provide public access to the following documents:

   (a) "Juror Selection Plan" of the Court, including the Plan's verbatim description of the method used in determining the method and manner of random selection.

(b) a verbal or graphically charted description of the procedure employed in the automated selection system; and,

(c) a copy of the Court's authorization and instruction order to the person or computer service organization which carries out automated name selection tasks for the Court.

R. ASSIGNMENT TO PANELS

1. Petit Jury

Names of persons summoned and appearing for petit jury service may be inserted in a panel assignment wheel; from which separate trial panels will be selected by lot. Ordinarily, all jurors will be summoned from the jury wheel of the court location in which the assigned Judge is sitting. As is needed, an individual judicial officer may Issue a written order requesting the selection of a panel from another wheel(s). The Clerk shall prepare for the use of the Court and counsel a separate list of names of persons assigned to each petit jury panel.

2. On the day of trial the names of persons impaneled for that trial drawn from the qualified jury wheel shall be made public provided that any District Judge in a case or cases, where the interest of justice so require, may order that the names be kept confidential until the time of voir dire examination.

3. Grand Jury

From time to time, as a grand jury is required, the Clerk shall publicly draw, at random, a pro rata number of names from the qualified jury wheels in the eastern and western divisions. In the eastern division, for grand jurors to appear in Cleveland, the ratio used from each qualified jury wheel shall be eight (8) names from the Cleveland wheel to one (1) name from the Youngstown wheel to one (1) name from the Akron wheel. In the eastern division, for grand Jurors to appear in Akron, the ratio used from each qualified jury wheel shall be six (6) names from the Akron wheel to three (3) names from the Youngstown wheel to one (1.) name from the Cleveland wheel. In the western division, for grand jurors to appear In Toledo, the names shall be drawn from the Toledo qualified jury wheel. In all cases, the persons so chosen would be summoned and would constitute the grand jury array "from which the grand jury would be selected to serve at Cleveland, Akron, or Toledo.

S. FREQUENCY OF SERVICE

1. In any two-year period, no person shall be required (1) to serve or attend court for prospective service as a petit juror for a total of more than thirty (30) days, except when necessary to complete service in a particular case, or (2) serve on more than one grand Jury, or (3) serve as both a grand and petit juror. A record shall be kept of the service of each juror.

2. In order to avoid an undue burden on Jurors during the period of their service, reasonable requests from jurors for temporary excuses from service during the session may be considered.

CERTIFICATE OF APPROVAL

This is to certify that, in accordance with 28 U.S.C. 1863(a) the foregoing plan has been duly received and approved as complying with the law by a Reviewing Panel consisting of the members of the Judicial Council for the Sixth Circuit of the United States and the Chief Judge of the District to which the plan is applicable.

This 8TH Day of August 1997.

Boyce F. Martin, Jr.
Chief Judge
United States Court of Appeals
for the Sixth. Circuit

This is to certify that, in accordance with 28 U.S.C. 1863(a), a true copy of the foregoing plan was filed with the Administrative Office of the U.S. Courts, Washington, B.C., 20544, by depositing a true copy in the United States mail, properly addressed, upon this date.

This 18th day of August 1997

George W. White
Chief Judge
United States District Court

APPENDIX D

Rule 57.10 Procedure for the Assignment of Cases

The procedure of the assignment of cases shall be the same for the Eastern and Western Divisions. Each of the District Judges in the Eastern and Western Divisions shall be assigned an equal share of the cases filed in his or her division except that the Chief Judge shall be assigned a one-half (50 percent) share. This shall apply to criminal cases and to the miscellaneous docket.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OHIO EASTERN DIVISION

UNITED STATES OF AMERICA

Plaintiff

Case No. 4:01CR207

JUDGE LESLEY WELLS

vs.

JAMES A. TRAFICANT, JR.

Defendant

DEFENDANT'S MOTION FOR AN INCLUSION OF ALLCOUNTIES IN THE NORTHERN DISTRICT OF OHIO IN THE VOIR DIRE

Defendant's motion to include all counties of the Northern District of Ohio in the Voir Dire.

Pro Se defendant requests the court to include all counties in the Northern District of Ohio with no exception. All defendants are entitled to a trial by a jury of their peers; the particular status of a defendant is nowhere excepted in the Sixth Amendment. The Sixth Amendment ensures impartialment of an impartial jury of the state and districts where the supposed crime shall have been committed.

Pro Se defendant, as a political figure, receives affirmative and negative votes from the district in which he represents, for the court to assume that the citizens of the district represented by the pro se defendant cannot make a fair and impartial decision concerning the evidentiary matter of this case would imply prejudice against the defendant and further give the government an unfair advantage.

The Sixth Amendment provides for a fair and impartial trial by a jury of one's peers, and the most significant peers relative to the pro se defendant do reside within the district in which he represents, who have the knowledge of the defendant and have been both proponents and opponents.

James A.

Dated: January 14, 2002

James A. Traficant, Jr.
Youngstown, Ohio

44503

Market Street

CERTIFICATE OF SERVICE

The undersigned certifies that on _____, 2002, a true and accurate copy of the foregoing was deposited in a properly addressed postage prepaid envelope addressed to Craig S. Morford, Assistant U.S. Attorney, United States Attorney's Office, 1800 Bank One Center, 600 Superior Avenue, East, Cleveland, Ohio 44114.

APPENDIX F

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA	)	CASE NO. 4:01 CR 207
	)	
	)	JUDGE LESLEY WELLS
Plaintiff	)	
	)	ORDER DENYING DEFENDANT'S MOTION FOR INCLUSION OF ALL COUNTIES IN THE NORTHERN DISTRICT OF OHIO IN THE VOIR DIRE
-vs-	)	
	)	
JAMES A. TRAFICANT, JR.	)	
	)	
Defendant	)	
	)	
	)	

Before the Court is Defendant Traficant's Motion for an Inclusion of All Counties in the Northern District of Ohio in the Voir Dire. (Docket # 128).

According to the Court's 24 July 2001 scheduling order, the deadline for the filing of pretrial motions was 9 January 2002.[1] (Docket # 28). Defendant Traficant did not file his motion until 14 January 2002. The motion is untimely and is denied as such.

Even if the motion were timely, this Court would deny it. In the Northern District of Ohio, jury selection is conducted pursuant to the district's Juror Selection Plan. The current Plan was approved, first, by the district judges of the Northern District of Ohio,[2] and, then, by the Sixth Circuit Judicial Council,[3] which certified that the Plan complies with federal law.[4] Under the Plan, every defendant who is assigned to a judge sitting in Cleveland will have jurors from the following counties: Ashland, Ashtabula, Crawford, Cuyahoga, Geauga, Lake, Lorain, Medina, and Richland. Every criminal case, including this case, arising in the Eastern Division of the Northern District of Ohio[5] is randomly assigned to a judge in the Eastern Division of the Northern District of Ohio.[5]

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[1] This deadline was reiterated by the Court at the 21 December 2001 Status Hearing and the 4 January 2002 Final Pretrial Conference.

[2] On 4 June 2001.

The juror pool for every criminal case in the Northern District of Ohio is determined in accordance with the Juror Selection Plan. Defendant Traficant, like all other criminal defendants, will have a juror pool selected through this system.

The Motion for an Inclusion of All Counties in the Northern District of Ohio in the Voir Dire is denied.

UNITED STATES DISTRICT

IT IS SO ORDERED.

3. On 24 June 2001.

4. 28U.S.C. § I863(a).

5. The Eastern Division includes the following counties: Ashland, Ashtabula, Carroll, Columbiana, Crawford, Cuyahoga, Geauga, Holmes, Lake, Lorain, Mahoning, Medina, Portage, Richland, Stark, Summit, Trumbull, Tuscarawas, and Wayne.

6. The Eastern Division has courthouses in Akron, Cleveland, and Youngstown,

APPENDIX G

RULES

Committee on Standards

of Official Conduct

Adopted March 19, 2003

108th Congress

U.S. HOUSE OF REPRESENTATIVES

WASHINGTON, D.C. 20515

COMMITTEE ON STANDARDS

OF OFFICIAL CONDUCT

United States House of Representatives
One Hundred Eighth Congress

JOEL HEFLEY, Colorado, *Chairman*

DOC HASTINGS, Washington

JUDY BIGGERT, Illinois

KENNY C. HULSHOF, Missouri

STEVEN C. LaTOURETTE, Ohio

ALAN B. MOLLOHAN, West Virginia, *Ranking Minority Member*

STEPHANIE TUBBS JONES, Ohio

GENE GREEN, Texas

LUCILLE ROYBAL-ALLARD, California

MICHAEL F. DOYLE, Pennsylvania

John E. Vargo, *Acting Chief Counsel*

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FOREWORD

The Committee on Standards of Official Conduct is unique in the House of Representatives. Consistent with the duty to carry out its advisory and enforcement responsibilities in an impartial manner, the Committee is the only standing committee of the House of Representatives the membership of which is divided evenly by party. These rules are intended to provide a fair procedural framework for the conduct of the Committee's activities and to help insure that the Committee serves well the people of the United States, the House of Representatives, and the Members, officers, and employees of the House of Representatives.

PART I—GENERAL COMMITTEE RULES

Rule 1. General Provisions

(a) So far as applicable, these rules and the Rules of the House of Representatives shall be the rules of the Committee and any subcommittee. The Committee adopts these rules under the authority of clause 2(a)(1) of Rule XI of the Rules of the House of Representatives, 108th Congress.

(b) The rules of the Committee may be modified, amended, or repealed by a vote of a majority of the Committee.

(c) When the interests of justice so require, the Committee, by a majority vote of its members, may adopt any special procedures, not inconsistent with these rules, deemed necessary to resolve a particular matter before it. Copies of such special procedures shall be furnished to all parties in the matter.

(d) The Chairman and Ranking Minority Member shall have access to such information that they request as necessary to conduct Committee business.

Rule 2. Definitions

(a) "Committee" means the Committee on Standards of Official Conduct.

(b) "Complaint" means a written allegation of improper conduct against a Member, officer, or employee of the House of Representatives filed with the Committee with the intent to initiate an inquiry.

(c) "Inquiry" means an investigation by an investigative subcommittee into allegations against a Member, officer, or employee of the House of Representatives.

(d) "Investigative Subcommittee" means a subcommittee designated pursuant to Rule 19(a) to conduct an inquiry to determine if a Statement of Alleged Violation should be issued.

(e) "Statement of Alleged Violation" means a formal charging document filed by an investigative subcommittee with the Committee containing specific allegations against a Member, officer, or employee of the House of Representatives of a violation of the Code of Official Conduct, or of a law, rule, regulation, or other standard of conduct applicable to the performance of official duties or the discharge of official responsibilities.

(f) "Adjudicatory Subcommittee" means a subcommittee designated pursuant to Rule 23(a), that holds an adjudicatory hearing and determines whether the counts in a Statement of Alleged Violation are proved by clear and convincing evidence.

(g) "Sanction Hearing" means a Committee hearing to determine what sanction, if any, to adopt or to recommend to the House of Representatives.

(h) "Respondent" means a Member, officer, or employee of the House of Representatives who is the subject of a complaint filed with the Committee or who is the subject of an inquiry or a Statement of Alleged Violation.

(i) "Office of Advice and Education" refers to the Office established by section 803(i) of the Ethics Reform Act of 1989. The Office handles inquiries; prepares written opinions in response to specific requests; develops general guidance; and organizes seminars, workshops, and briefings for the benefit of the House of Representatives.

(j) "Member" means a Representative in, or a Delegate to, or the Resident Commissioner to, the U.S. House of Representatives.

Rule 3. Advisory Opinions and Waivers

(a) The Office of Advice and Education shall handle inquiries; prepare written opinions providing specific advice; develop general guidance; and organize seminars, workshops, and briefings for the benefit of the House of Representatives.

(b) Any Member, officer, or employee of the House of Representatives, may request a written opinion with respect to the propriety of any current or proposed conduct of such Member, officer, or employee.

(c) The Office of Advice and Education may provide information and guidance regarding laws, rules, regulations, and other standards of conduct applicable to Members, officers, and employees in the performance of their duties or the discharge of their responsibilities.

(d) In general, the Committee shall provide a written opinion to an individual only in response to a written request, and the written opinion shall address the conduct only of the inquiring individual, or of persons for whom the inquiring individual is responsible as employing authority.

(e) A written request for an opinion shall be addressed to the Chairman of the Committee and shall include a complete and accurate statement of the relevant facts. A request shall be signed by the requester or the requester's authorized representative or employing authority. A representative shall disclose to the Committee the identity of the principal on whose behalf advice is being sought.

(f) The Office of Advice and Education shall prepare for the Committee a response to each written request for an opinion from a Member, officer or employee. Each response shall discuss all applicable laws, rules, regulations, or other standards.

(g) Where a request is unclear or incomplete, the Office of Advice and Education may seek additional information from the requester.

(h) The Chairman and Ranking Minority Member are authorized to take action on behalf of the Committee on any proposed written opinion that they determine does not require consideration by the Committee. If the Chairman or Ranking Minority Member requests a written opinion, or seeks a waiver, extension, or approval pursuant to Rules 3(l), 4(c), 4(e), or 4(h), the next ranking member of the requester's party is authorized to act in lieu of the requester.

(i) The Committee shall keep confidential any request for advice from a Member, officer, or employee, as well as any response thereto.

(j) The Committee may take no adverse action in regard to any conduct that has been undertaken in reliance on a written opinion if the conduct conforms to the specific facts addressed in the opinion.

(k) Information provided to the Committee by a Member, officer, or employee seeking advice regarding prospective conduct may not be used as the basis for initiating an investigation under clause 3(a)(2) or clause 3(b) of Rule XI of the Rules of the House of Representatives, if such Member, officer, or employee acts in good faith in accordance with the written advice of the Committee.

(l) A written request for a waiver of clause 5 of House Rule XXV (the House gift rule), or for any other waiver or approval, shall be treated in all respects like any other request for a written opinion.

(m) A written request for a waiver of clause 5 of House Rule XXV (the House gift rule) shall specify the nature of the waiver being sought and the specific circumstances justifying the waiver.

(n) An employee seeking a waiver of time limits applicable to travel paid for by a private source shall include with the request evidence that the employing authority is aware of the request. In any other instance where proposed employee conduct may reflect on the performance of official duties, the Committee may require that the requester submit evidence that the employing authority knows of the conduct.

Rule 4. Financial Disclosure

(a) In matters relating to Title I of the Ethics in Government Act of 1978, the Committee shall coordinate with the Clerk of the House of Representatives, Legislative Resource Center, to assure that appropriate individuals are notified of their obligation to file Financial Disclosure Statements and that such individuals are provided in a timely fashion with filing instructions and forms developed by the Committee.

(b) The Committee shall coordinate with the Legislative Resource Center to assure that information that the Ethics in Government Act requires to be placed on the public record is made public.

(c) The Chairman and Ranking Minority Member are authorized to grant on behalf of the Committee requests for reasonable extensions of time for the filing of Financial Disclosure Statements. Any such request must be received by the Committee no later than the date on which the statement in question is due. A request received after such date may be granted by the Committee only in extraordinary circumstances. Such extensions for one individual in a calendar year shall not exceed a total of 90 days. No extension shall be granted authorizing a nonincumbent candidate to file a statement later than 30 days prior to a primary or general election in which the candidate is participating.

(d) An individual who takes legally sufficient action to withdraw as a candidate before the date on which that individual's Financial Disclosure Statement is due under the Ethics in Government Act shall not be required to file a Statement. An individual shall not be excused from filing a Financial Disclosure Statement when withdrawal as a candidate occurs after the date on which such Statement was due.

(e) Any individual who files a report required to be filed under title I of the Ethics in Government Act more than 30 days after the later of—

(1) the date such report is required to be filed, or

(2) if a filing extension is granted to such individual, the last day of the filing extension period, is required by such Act to pay a late filing

fee of $200. The Chairman and Ranking Minority Member are authorized to approve requests that the fee be waived based on extraordinary circumstances.

(f) Any late report that is submitted without a required filing fee shall be deemed procedurally deficient and not properly filed.

(g) The Chairman and Ranking Minority Member are authorized to approve requests for waivers of the aggregation and reporting of gifts as provided by section 102(a)(2)(C) of the Ethics in Government Act. If such a request is approved, both the incoming request and the Committee response shall be forwarded to the Legislative Resource Center for placement on the public record.

(h) The Chairman and Ranking Minority Member are authorized to approve blind trusts as qualifying under section 102(f)(3) of the Ethics in Government Act. The correspondence relating to formal approval of a blind trust, the trust document, the list of assets transferred to the trust, and any other documents required by law to be made public, shall be forwarded to the Legislative Resource Center for such purpose.

(i) The Committee shall designate staff counsel who shall review Financial Disclosure Statements and, based upon information contained therein, indicate in a form and manner prescribed by the Committee whether the Statement appears substantially accurate and complete and the filer appears to be in compliance with applicable laws and rules.

(j) Each Financial Disclosure Statement shall be reviewed within 60 days after the date of filing.

(k) If the reviewing counsel believes that additional information is required because (1) the Statement appears not substantially accurate or complete, or (2) the filer may not be in compliance with applicable laws or rules, then the reporting individual shall be notified in writing of the additional information believed to be required, or of the law or rule with which the reporting individual does not appear to be in compliance. Such notice shall also state the time within which a response is to be submitted. Any such notice shall remain confidential.

(l) Within the time specified, including any extension granted in accordance with clause (c), a reporting individual who concurs with the Committee's notification that the Statement is not complete, or that other action is required, shall submit the necessary information or take appropriate action. Any amendment may be in the form of a revised Financial Disclosure Statement or an explanatory letter addressed to the Clerk of the House of Representatives.

(m) Any amendment shall be placed on the public record in the same manner as other Statements. The individual designated by the Committee to review the original Statement shall review any amendment thereto.

(n) Within the time specified, including any extension granted in accordance with clause (c), a reporting individual who does not agree with the Committee that the Statement is deficient or that other action is required, shall be provided an opportunity to respond orally or in writing. If the explanation is accepted, a copy of the response, if written, or a note summarizing an oral response, shall be retained in Committee files with the original report.

(o) The Committee shall be the final arbiter of whether any Statement requires clarification or amendment.

(p) If the Committee determines, by vote of a majority of its members, that there is reason to believe that an individual has willfully failed to file a Statement or has willfully falsified or willfully failed to file information required to be reported, then the Committee shall refer the name of the individual, together with the evidence supporting its finding, to the Attorney General pursuant to section 104(b) of the Ethics in Government Act. Such referral shall not preclude the Committee from initiating such other action as may be authorized by other provisions of law or the Rules of the House of Representatives.

Rule 5. Meetings

(a) The regular meeting day of the Committee shall be the second Wednesday of each month, except when the House of Representatives is not meeting on that day. When the Committee Chairman determines that there is sufficient reason, a meeting may be called on additional days. A regularly scheduled meeting need not be held when the Chairman determines there is no business to be considered.

(b) The Chairman shall establish the agenda for meetings of the Committee and the Ranking Minority Member may place additional items on the agenda.

(c) All meetings of the Committee or any subcommittee shall occur in executive session unless the Committee or subcommittee, by an affirmative vote of a majority of its members, opens the meeting or hearing to the public.

(d) Any hearing held by an adjudicatory subcommittee or any sanction hearing held by the Committee shall be open to the public unless the Committee or subcommittee, by an affirmative vote of a majority of its members, closes the hearing to the public.

(e) A subcommittee shall meet at the discretion of its Chairman.

(f) Insofar as practicable, notice for any Committee or subcommittee meeting shall be provided at least seven days in advance of the meeting. The

Chairman of the Committee or subcommittee may waive such time period for good cause.

Rule 6. Committee Staff

The staff is to be assembled and retained as a professional, nonpartisan staff.

Each member of the staff shall be professional and demonstrably qualified for the position for which he is hired.

The staff as a whole and each individual member of the staff shall perform all official duties in a nonpartisan manner.

No member of the staff shall engage in any partisan political activity directly affecting any congressional or presidential election.

No member of the staff or outside counsel may accept public speaking engagements or write for publication on any subject that is in any way related to his or her employment or duties with the Committee without specific prior approval from the Chairman and Ranking Minority Member.

All staff members shall be appointed by an affirmative vote of a majority of the members of the Committee. Such vote shall occur at the first meeting of the membership of the Committee during each Congress and as necessary during the Congress.

Subject to the approval of the Committee on House Administration, the Committee may retain counsel not employed by the House of Representatives whenever the Committee determines, by an affirmative vote of a majority of the members of the Committee, that the retention of outside counsel is necessary and appropriate.

If the Committee determines that it is necessary to retain staff members for the purpose of a particular investigation or other proceeding, then such staff shall be retained only for the duration of that particular investigation or proceeding.

Outside counsel may be dismissed prior to the end of a contract between the Committee and such counsel only by a majority vote of the members of the Committee.

In addition to any other staff provided for by law, rule, or other authority, with respect to the Committee, the Chairman and Ranking Minority Member each may appoint one individual as a shared staff member from his or her personal staff to perform service for the Committee. Such shared staff may assist the Chairman or Ranking Minority Member on any subcommittee on which he serves. Only paragraphs (c), (e) of this Rule, and Rule 7(b) shall apply to shared staff.

Rule 7. Confidentiality

(a) Before any Member or employee of the Committee, including members of an investigative subcommittee selected under clause 5(a)(4) of Rule X of the House of Representatives and shared staff designated pursuant to Committee Rule 6(j), may have access to information that is confidential under the rules of the Committee, the following oath (or affirmation) shall be executed in writing:

"I do solemnly swear (or affirm) that I will not disclose, to any person or entity outside the Committee on Standards of Official Conduct, any information received in the course of my service with the Committee, except as authorized by the Committee or in accordance with its rules."

Copies of the executed oath shall be provided to the Clerk of the House as part of the records of the House. Breaches of confidentiality shall be investigated by the Committee and appropriate action shall be taken.

(b) No member of the staff or outside counsel may make public, unless approved by an affirmative vote of a majority of the members of the Committee, any information, document, or other material that is confidential, derived from executive session, or classified and that is obtained during the course of employment with the Committee.

(c) Committee members and staff shall not disclose any evidence relating to an investigation to any person or organization outside the Committee unless authorized by the Committee.

(d) Members and staff of the Committee shall not disclose to any person or organization outside the Committee, unless authorized by the Committee, any information regarding the Committee's or a subcommittee's investigative, adjudicatory or other proceedings, included but not limited to: (i) the fact or nature of any complaints; (ii) executive session proceedings; (iii) information pertaining to or copies of any Committee or subcommittee report, study or other document which purports to express the views, fining, conclusions or recommendations of the Committee or subcommittee in connection with any of its activities or proceedings; or (iv) any other information or allegation respecting the conduct of a Member, officer or employee of the House.

(e) Except as otherwise specifically authorized by the Committee, no Committee member or staff member shall disclose to any person outside the Committee, the name of any witness subpoenaed to testify or to produce evidence.

(f) The Committee shall not disclose to any person or organization outside the Committee any information concerning the conduct of a respondent until it has transmitted a Statement of Alleged Violation to such respondent and the respondent has been given full opportunity to respond pursuant to Rule 22. The Statement of Alleged Violation and any written response thereto shall be made public at the first meeting or hearing on the matter that is open to the public after such opportunity has been provided. Any other materials in the possession of the Committee regarding such statement may be made public as authorized by the Committee to the extent consistent with the Rules of the House of Representatives. If no public hearing is held on the matter, the Statement of Alleged Violation and any written response thereto shall be included in the Committee's final report on the matter to the House of Representatives.

(g) Unless otherwise determined by a vote of the Committee, only the Chairman or Ranking Minority Member of the Committee, after consultation with each other, may make public statements regarding matters before the Committee or any subcommittee.

(h) The Committee may establish procedures necessary to prevent the unauthorized disclosure of any testimony or other information received by the Committee or its staff.

Rule 8. Subcommittees—General Policy and Structure

(a) Notwithstanding any other provision of these Rules, the Chairman and Ranking Minority Member of the Committee may consult with an investigative subcommittee either on their own initiative or on the initiative of the subcommittee, shall have access to evidence and information before a subcommittee with whom they so consult, and shall not thereby be precluded from serving as full, voting members of any adjudicatory subcommittee. Except for the Chairman and Ranking Minority Member of the Committee pursuant to this paragraph, evidence in the possession of an investigative subcommittee shall not be disclosed to other Committee members except by a vote of the subcommittee.

(b) The Committee may establish other noninvestigative and nonadjudicatory subcommittees and may assign to them such functions as it may deem appropriate. The membership of each subcommittee shall provide equal representation for the majority and minority parties.

(c) The Chairman may refer any bill, resolution, or other matter before the Committee to an appropriate subcommittee for consideration. Any such bill, resolution, or other matter may be discharged from the subcommittee to which it was referred by a majority vote of the Committee.

(d) Any member of the Committee may sit with any noninvestigative or nonadjudicatory subcommittee, but only regular members of such subcommittee may vote on any matter before that subcommittee.

Rule 9. Quorums and Member Disqualification

(a) The quorum for an investigative subcommittee to take testimony and to receive evidence shall be two members, unless otherwise authorized by the House of Representatives.

(b) The quorum for an adjudicatory subcommittee to take testimony, receive evidence, or conduct business shall consist of a majority plus one of the members of the adjudicatory subcommittee.

(c) Except as stated in clauses (a) and (b) of this rule, a quorum for the purpose of conducting business consists of a majority of the members of the Committee or subcommittee.

(d) A member of the Committee shall be ineligible to participate in any Committee or subcommittee proceeding in which he is the respondent.

(e) A member of the Committee may disqualify himself from participating in any investigation of the conduct of a Member, officer, or employee of the House of Representatives upon the submission in writing and under oath of an affidavit of disqualification stating that the member cannot render an impartial and unbiased decision. If the Committee approves and accepts such affidavit of disqualification, or if a member is disqualified pursuant to Rule 17(e) or Rule 23(a), the Chairman shall so notify the Speaker and ask the Speaker to designate a Member of the House of Representatives from the same political party as the disqualified member of the Committee to act as a member of the Committee in any Committee proceeding relating to such investigation.

Rule 10. Vote Requirements

(a) The following actions shall be taken only upon an affirmative vote of a majority of the members of the Committee or subcommittee, as appropriate:

(1) Issuing a subpoena.

(2) Adopting a full Committee motion to create an investigative subcommittee.

(3) Adoption or amendment of a Statement of Alleged Violation.

(4) Finding that a count in a Statement of Alleged Violation has been proved by clear and convincing evidence.

(5) Sending a letter of reproval.

(6) Adoption of a recommendation to the House of Representatives that a sanction be imposed.

(7) Adoption of a report relating to the conduct of a Member, officer, or employee.

(8) Issuance of an advisory opinion of general applicability establishing new policy.

(b) Except as stated in clause (a), action may be taken by the Committee or any subcommittee thereof by a simple majority, a quorum being present.

(c) No motion made to take any of the actions enumerated in clause (a) of this Rule may be entertained by the Chair unless a quorum of the Committee is present when such motion is made.

Rule 11. Committee Records

(a) All communications and all pleadings pursuant to these rules shall be filed with the Committee at the Committee's office or such other place as designated by the Committee.

(b) All records of the Committee which have been delivered to the Archivist of the United States shall be made available to the public in accordance with Rule VII of the Rules of the House of Representatives.

Rule 12. Broadcasts of Committee and Subcommittee Proceedings

(a) Television or radio coverage of a Committee or subcommittee hearing or meeting shall be without commercial sponsorship.

(b) No witness shall be required against his or her will to be photographed or otherwise to have a graphic reproduction of his or her image made at any hearing or to give evidence or testimony while the broadcasting of that hearing, by radio or television, is being conducted. At the request of any witness, all media microphones shall be turned off, all television and camera lenses shall be covered, and the making of a graphic reproduction at the hearing shall not be permitted. This paragraph supplements clause 2(k)(5) of Rule XI of the Rules of the House of Representatives relating to the protection of the rights of witnesses.

(c) Not more than four television cameras, operating from fixed positions, shall be permitted in a hearing or meeting room. The Committee may allocate the positions of permitted television cameras among the television media in consultation with the Executive Committee of the Radio and Television Correspondents' Galleries.

(d) Television cameras shall be placed so as not to obstruct in any way the space between any witness giving evidence or testimony and any member of the Committee, or the visibility of that witness and that member to each other.

Television cameras shall not be placed in positions that unnecessarily obstruct the coverage of the hearing or meeting by the other media.

PART II—INVESTIGATIVE AUTHORITY

Rule 13. House Resolution

Whenever the House of Representatives, by resolution, authorizes or directs the Committee to undertake an inquiry or investigation, the provisions of the resolution, in conjunction with these Rules, shall govern. To the extent the provisions of the resolution differ from these Rules, the resolution shall control.

Rule 14. Committee Authority to Investigate—General Policy

(a) Pursuant to clause 3(b) of Rule XI of the Rules of the House of Representatives, the Committee may exercise its investigative authority when:

(1) information offered as a complaint by a Member of the House of Representatives is transmitted directly to the Committee;

(2) information offered as a complaint by an individual not a Member of the House is transmitted to the Committee, provided that a Member of the House certifies in writing that he or she believes the information is submitted in good faith and warrants the review and consideration of the Committee;

(3) the Committee, on its own initiative, establishes an investigative subcommittee;

(4) a Member, officer, or employee is convicted in a Federal, State, or local courts of a felony; or

(5) the House of Representatives, by resolution, authorizes or directs the Committee to undertake an inquiry or investigation.

(b) The Committee also has investigatory authority over:

(1) certain unauthorized disclosures of intelligence-related information, pursuant to House Rule X, clauses 11(g)(4) and (g)(5); or

(2) reports received from the Office of the Inspector General pursuant to House Rule II, clause 6(c)(5).

Rule 15. Complaints

(a) A complaint submitted to the Committee shall be in writing, dated, and properly verified (a document will be considered properly verified where a notary executes it with the language, "Signed and sworn to (or affirmed) before me on (date) by (the name of the person)" setting forth in simple, concise, and direct statements—

(1) the name and legal address of the party filing the complaint (hereinafter referred to as the "complainant");

(2) the name and position or title of the respondent;

(3) the nature of the alleged violation of the Code of Official Conduct or of other law, rule, regulation, or other standard of conduct applicable to the performance of duties or discharge of responsibilities; and

(4) the facts alleged to give rise to the violation. The complaint shall not contain innuendo, speculative assertions, or conclusory statements.

(b) Any documents in the possession of the complainant that relate to the allegations may be submitted with the complaint.

(c) Information offered as a complaint by a Member of the House of Representatives may be transmitted directly to the Committee.

(d) Information offered as a complaint by an individual not a Member of the House may be transmitted to the Committee, provided that a Member of the House certifies in writing that he or she believes the information is submitted in good faith and warrants the review and consideration of the Committee.

(e) A complaint must be accompanied by a certification, which may be unsworn, that the complainant has provided an exact copy of the filed complaint and all attachments to the respondent.

(f) The Committee may defer action on a complaint against a Member, officer, or employee of the House of Representatives when the complaint alleges conduct that the Committee has reason to believe is being reviewed by appropriate law enforcement or regulatory authorities, or when the Committee determines that it is appropriate for the conduct alleged in the complaint to be reviewed initially by law enforcement or regulatory authorities.

(g) A complaint may not be amended without leave of the Committee. Otherwise, any new allegations of improper conduct must be submitted in a new complaint that independently meets the procedural requirements of the Rules of the House of Representatives and the Committee's Rules.

(h) The Committee shall not accept, and shall return to the complainant, any complaint submitted within the 60 days prior to an election in which the subject of the complaint is a candidate.

(i) The Committee shall not consider a complaint, nor shall any investigation be undertaken by the Committee, of any alleged violation which occurred before the third previous Congress unless the Committee determines that the alleged violation is directly related to an alleged violation which occurred in a more recent Congress.

Rule 16. Duties of Committee Chairman and Ranking Minority Member

(a) Whenever information offered as a complaint is submitted to the Committee, the Chairman and Ranking Minority Member shall have 14 calendar days or 5 legislative days, whichever occurs first, to determine whether the information meets the requirements of the Committee's rules for what constitutes a complaint.

(b) Whenever the Chairman and Ranking Minority Member jointly determine that information submitted to the Committee meets the requirements of the Committee's rules for what constitutes a complaint, they shall have 45 calendar days or 5 legislative days, whichever is later, after the date that the Chairman and Ranking Minority Member determine that information filed meets the requirements of the Committee's rules for what constitutes a complaint, unless the Committee by an affirmative vote of a majority of its members votes otherwise, to--

recommend to the Committee that it dispose of the complaint, or any portion thereof, in any manner that does not require action by the House, which may include dismissal of the complaint or resolution of the complaint by a letter to the Member, officer, or employee of the House against whom the complaint is made;

establish an investigative subcommittee; or

request that the Committee extend the applicable 45-calendar day period when they determine more time is necessary in order to make a recommendation under paragraph (1) or (2) of Rule 16(b).

(c) The Chairman and Ranking Minority Member may jointly gather additional information concerning alleged conduct which is the basis of a complaint or of information offered as a complaint until they have established an investigative subcommittee or the Chairman or Ranking Minority Member has placed on the agenda the issue of whether to establish an investigative subcommittee.

(d) If the Chairman and Ranking Minority Member jointly determine that information submitted to the Committee meets the requirements of the Committee rules for what constitutes a complaint, and the complaint is not disposed of within 45 calendar days or 5 legislative days, whichever is later, and no additional 45-day extension is made, then they shall establish an investigative subcommittee and forward the complaint, or any portion thereof, to that subcommittee for its consideration. If at any time during the time period either the Chairman or Ranking Minority Member places on the agenda the issue of whether to establish an investigative subcommittee, then an investigative subcommittee may be established only by an affirmative vote of a majority of the members of the Committee.

(e) Whenever the Chairman and Ranking Minority Member jointly determine that information submitted to the Committee does not meet the requirements for what constitutes a complaint set forth in the Committee rules, they may (1) return the information to the complainant with a statement that it fails to meet the requirements for what constitutes a complaint set forth in the Committee's rules; or (2) recommend to the Committee that it authorize the establishment of an investigative subcommittee.

Rule 17. Processing of Complaints

(a) If a complaint is in compliance with House and Committee Rules, a copy of the complaint and the Committee Rules shall be forwarded to the respondent within five days with notice that the complaint conforms to the applicable rules.

(b) The respondent may, within 30 days of the Committee's notification, provide to the Committee any information relevant to a complaint filed with the Committee. The respondent may submit a written statement in response to the complaint. Such a statement shall be signed by the respondent. If the statement is prepared by counsel for the respondent, the respondent shall sign a representation that he/she has reviewed the response and agrees with the factual assertions contained therein.

(c) The Committee staff may request information from the respondent or obtain additional information pertinent to the case from other sources prior to the establishment of an investigative subcommittee only when so directed by the Chairman and Ranking Minority Member.

(d) The respondent shall be notified in writing regarding the Committee's decision either to dismiss the complaint or to create an investigative subcommittee.

(e) The respondent shall be notified of the membership of the investigative subcommittee and shall have ten days after such notice is transmitted to object to the participation of any subcommittee member. Such objection shall be in writing and shall be on the grounds that the subcommittee member cannot render an impartial and unbiased decision. The subcommittee member against whom the objection is made shall be the sole judge of his or her disqualification.

Rule 18. Committee-Initiated Inquiry

(a) Notwithstanding the absence of a filed complaint, the Committee may consider any information in its possession indicating that a

Member, officer, or employee may have committed a violation of the Code of Official Conduct or any law, rule, regulation, or other standard of conduct applicable to the conduct of such Member, officer, or employee in the performance of his or her duties or the discharge of his or her responsibilities. The Chairman and Ranking Minority Member may jointly gather additional information concerning such an alleged violation by a Member, officer, or employee unless and until an investigative subcommittee has been established.

(b) If the Committee votes to establish an investigative subcommittee, the Committee shall proceed in accordance with Rule 19.

(c) Any written request by a Member, officer, or employee of the House of Representatives that the Committee conduct an inquiry into such person's own conduct shall be processed in accordance with subsection (a) of this Rule.

(d) An inquiry shall not be undertaken regarding any alleged violation that occurred before the third previous Congress unless a majority of the Committee determines that the alleged violation is directly related to an alleged violation that occurred in a more recent Congress.

(e) An inquiry shall be undertaken by an investigative subcommittee with regard to any felony conviction of a Member, officer, or employee of the House of Representatives in a Federal, State, or local court who has been sentenced. Notwithstanding this provision, the Committee has the discretion to initiate an inquiry upon an affirmative vote of a majority of the members of the Committee at any time prior to conviction or sentencing.

Rule 19. Investigative Subcommittee

(a) Upon the establishment of an investigative subcommittee, the Chairman and Ranking Minority Member of the Committee shall designate four members (with equal representation from the majority and minority parties) to serve as an investigative subcommittee to undertake an inquiry. Members of the Committee and Members of the House selected pursuant to clause 5(a)(4)(A) of Rule X of the House of Representatives, are eligible for appointment to an investigative subcommittee, as determined by the Chairman and Ranking Minority Member of the Committee. At the time of appointment, the Chairman shall designate one member of the subcommittee to serve as the chairman and the Ranking Minority Member shall designate one member of the subcommittee to serve as the ranking minority member of the investigative subcommittee. The Chairman and Ranking Minority Member of the Committee may serve as members of an investigative subcommittee, but may not serve as non-voting, ex-officio members.

(b) In an inquiry undertaken by an investigative subcommittee—

(1) All proceedings, including the taking of testimony, shall be conducted in executive session and all testimony taken by deposition or things produced pursuant to subpoena or otherwise shall be deemed to have been taken or produced in executive session.

(2) The Chairman of the investigative subcommittee shall ask the respondent and all witnesses whether they intend to be represented by counsel. If so, the respondent or witnesses or their legal representatives shall provide written designation of counsel. A respondent or witness who is represented by counsel shall not be questioned in the absence of counsel unless an explicit waiver is obtained.

The subcommittee shall provide the respondent an opportunity to present, orally or in writing, a statement, which must be under oath or affirmation, regarding the allegations and any other relevant questions arising out of the inquiry.

(4) The staff may interview witnesses, examine documents and other evidence, and request that submitted statements be under oath or affirmation and that documents be certified as to their authenticity and accuracy.

(5) The subcommittee, by a majority vote of its members, may require, by subpoena or otherwise, the attendance and testimony of witnesses and the production of such books, records, correspondence, memoranda, papers, documents, and other items as

it deems necessary to the conduct of the inquiry. Unless the Committee otherwise provides, the subpoena power shall rest in the Chairman and Ranking Minority Member of the Committee and a subpoena shall be issued upon the request of the investigative subcommittee.

(6) The subcommittee shall require that testimony be given under oath or affirmation. The form of the oath or affirmation shall be: "Do you solemnly swear (or affirm) that the testimony you will give before this subcommittee in the matter now under consideration will be the truth, the whole truth, and nothing but the truth (so help you God)?" The oath or affirmation shall be administered by the Chairman or subcommittee member designated by the Chairman to administer oaths.

(c) During the inquiry, the procedure respecting the admissibility of evidence and rulings shall be as follows:

(1) Any relevant evidence shall be admissible unless the evidence is privileged under the precedents of the House of Representatives.

(2) The Chairman of the subcommittee or other presiding member at any investigative subcommittee proceeding shall rule upon any question of admissibility or pertinency of evidence, motion, procedure or any other matter, and may direct any witness to answer any question under penalty of contempt. A witness, witness' counsel, or a member of the subcommittee may appeal any

rulings to the members present at that proceeding. The majority vote of the members present at such proceeding on such appeal shall govern the question of admissibility, and no appeal shall lie to the Committee.

(3) Whenever a person is determined by a majority vote to be in contempt of the subcommittee, the matter may be referred to the Committee to determine whether to refer the matter to the House of Representatives for consideration.

(4) Committee counsel may, subject to subcommittee approval, enter into stipulations with the respondent and/or the respondent's counsel as to facts that are not in dispute.

(d) Upon an affirmative vote of a majority of the subcommittee members, and an affirmative vote of a majority of the full Committee, an investigative subcommittee may expand the scope of its investigation.

(e) Upon completion of the investigation, the staff shall draft for the investigative subcommittee a report that shall contain a comprehensive summary of the information received regarding the alleged violations.

(f) Upon completion of the inquiry, an investigative subcommittee, by a majority vote of its members, may adopt a Statement of Alleged Violation if it determines that there is substantial reason to believe that a violation of the Code of Official Conduct, or of a law, rule, regulation, or other standard of conduct applicable to the performance of official duties or the discharge of official responsibilities by a Member, officer, or employee of the House of Representatives has occurred. If more than one violation is alleged, such Statement shall be divided into separate counts. Each count shall relate to a separate violation, shall contain a plain and concise statement of the alleged facts of such violation, and shall include a reference to the provision of the Code of Official Conduct or law, rule, regulation or other applicable standard of conduct governing the performance of duties or discharge of responsibilities alleged to have been violated. A copy of such Statement shall be transmitted to the respondent and the respondent's counsel.

(g) If the investigative subcommittee does not adopt a Statement of Alleged Violation, it shall transmit to the Committee a report containing a summary of the information received in the inquiry, its conclusions and reasons therefore, and any appropriate recommendation.

Rule 20. Amendments to Statements of Alleged Violation

(a) An investigative subcommittee may, upon an affirmative vote of a majority of its members, amend its Statement of Alleged Violation anytime before the Statement of Alleged Violation is transmitted to the Committee; and

(b) If an investigative subcommittee amends its Statement of Alleged Violation, the respondent shall be notified in writing and shall have 30 calendar days from the date of that notification to file an answer to the amended Statement of Alleged Violation.

Rule 21. Committee Reporting Requirements

(a) Whenever an investigative subcommittee does not adopt a Statement of Alleged Violation and transmits a report to that effect to the Committee, the Committee may by an affirmative vote of a majority of its members transmit such report to the House of Representatives;

(b) Whenever an investigative subcommittee adopts a Statement of Alleged Violation but recommends that no further action be taken, it shall transmit a report to the Committee regarding the Statement of Alleged Violation; and

(c) Whenever an investigative subcommittee adopts a Statement of Alleged Violation, the respondent admits to the violations set forth in such Statement, the respondent waives his or her right to an adjudicatory hearing, and the respondent's waiver is approved by the Committee—

(1) the subcommittee shall prepare a report for transmittal to the Committee, a final draft of which shall be provided to the respondent not

less than 15 calendar days before the subcommittee votes on whether to adopt the report;

(2) the respondent may submit views in writing regarding the final draft to the subcommittee within 7 calendar days of receipt of that draft;

(3) the subcommittee shall transmit a report to the Committee regarding the Statement of Alleged Violation together with any views submitted by the respondent pursuant to subparagraph (2), and the Committee shall make the report, together with the respondent's views, available to the public before the commencement of any sanction hearing; and

(4) the Committee shall by an affirmative vote of a majority of its members issue a report and transmit such report to the House of Representatives, together with the respondent's views previously submitted pursuant to subparagraph (2) and any additional views respondent may submit for attachment to the final report; and

(d) Members of the Committee shall have not less than 72 hours to review any report transmitted to the Committee by an investigative subcommittee before both the commencement of a sanction hearing and the Committee vote on whether to adopt the report.

Rule 22. Respondent's Answer

(a)(1) Within 30 days from the date of transmittal of a Statement of Alleged Violation, the respondent shall file with the investigative subcommittee an answer, in writing and under oath, signed by respondent and respondent's counsel. Failure to file an answer within the time prescribed shall be considered by the Committee as a denial of each count.

(2) The answer shall contain an admission to or denial of each count set forth in the Statement of Alleged Violation and may include negative, affirmative, or alternative defenses and any supporting evidence or other relevant information.

(b) The respondent may file a Motion for a Bill of Particulars within 10 days of the date of transmittal of the Statement of Alleged Violation. If a Motion for a Bill of Particulars is filed, the respondent shall not be required to file an answer until 20 days after the subcommittee has replied to such motion.

(c)(1) The respondent may file a Motion to Dismiss within 10 days of the date of transmittal of the Statement of Alleged Violation or, if a Motion for a Bill of Particulars has been filed, within 10 days of the date of the subcommittee's reply to the Motion for a Bill of Particulars. If a Motion to Dismiss is filed, the respondent shall not be required to file an answer until 20 days after the subcommittee has replied to the Motion to Dismiss, unless the respondent previously filed a Motion for a Bill of Particulars, in which case the respondent shall not be required to file an answer until 10 days after the subcommittee has replied to the Motion to Dismiss. The investigative subcommittee shall rule upon any motion to dismiss filed during the period between the establishment of the subcommittee and the subcommittee's transmittal of a report or Statement of Alleged Violation to the Committee or to the Chairman and Ranking Minority Member at the conclusion of an inquiry, and no appeal of the subcommittee's ruling shall lie to the Committee.

(2) A Motion to Dismiss may be made on the grounds that the Statement of Alleged Violation fails to state facts that constitute a violation of the Code of Official Conduct or other applicable law, rule, regulation, or standard of conduct, or on the grounds that the Committee lacks jurisdiction to consider the allegations contained in the Statement.

(d) Any motion filed with the subcommittee pursuant to this rule shall be accompanied by a Memorandum of Points and Authorities.

(e)(1) The Chairman of the investigative subcommittee, for good cause shown, may permit the respondent to file an answer or motion after the day prescribed above.

(2) If the ability of the respondent to present an adequate defense is not adversely affected and special circumstances so require, the Chairman of the investigative subcommittee may

direct the respondent to file an answer or motion prior to the day prescribed above.

(f) If the day on which any answer, motion, reply, or other pleading must be filed falls on a Saturday, Sunday, or holiday, such filing shall be made on the first business day thereafter.

(g) As soon as practicable after an answer has been filed or the time for such filing has expired, the Statement of Alleged Violation and any answer, motion, reply, or other pleading connected therewith shall be transmitted by the Chairman of the investigative subcommittee to the Chairman and Ranking Minority Member of the Committee.

Rule 23. Adjudicatory Hearings

(a) If a Statement of Alleged Violation is transmitted to the Chairman and Ranking Minority Member pursuant to Rule 22, and no waiver pursuant to Rule 26(b) has occurred, the Chairman shall designate the members of the Committee who did not serve on the investigative subcommittee to serve on an adjudicatory subcommittee. The Chairman and Ranking Minority Member of the Committee shall be the Chairman and Ranking Minority Member of the adjudicatory subcommittee unless they served on the investigative subcommittee. The respondent shall be notified of the designation of the adjudicatory subcommittee and shall have ten days after such notice is transmitted to object to the participation of any subcommittee member. Such objection shall be in writing and shall be on the grounds that the member cannot render an impartial and unbiased decision. The member against whom the objection is made shall be the sole judge of his or her disqualification.

(b) A majority of the adjudicatory subcommittee membership plus one must be present at all times for the conduct of any business pursuant to this rule.

(c) The adjudicatory subcommittee shall hold a hearing to determine whether any counts in the Statement of Alleged Violation have been proved by clear and convincing evidence and shall make findings of fact, except where such violations have been admitted by respondent.

(d) At an adjudicatory hearing, the subcommittee may require, by subpoena or otherwise, the attendance and testimony of such witnesses and production of such books, records, correspondence, memoranda, papers, documents, and other items as it deems necessary. Depositions, interrogatories, and sworn statements taken under any investigative subcommittee direction may be accepted into the hearing record.

(e) The procedures set forth in clause 2 (g) and (k) of Rule XI of the Rules of the House of Representatives shall apply to adjudicatory hearings. All such hearings shall be open to the public unless the adjudicatory subcommittee, pursuant to such clause, determines that the hearings or any part thereof should be closed.

(f)(1) The adjudicatory subcommittee shall, in writing, notify the respondent that the respondent and his or her counsel have the right to inspect, review, copy, or photograph books, papers, documents, photographs, or other tangible objects that the adjudicatory subcommittee counsel intends to use as evidence against the respondent in an adjudicatory hearing. The respondent shall be given access to such evidence, and shall be provided the names of witnesses the subcommittee counsel intends to call, and a summary of their expected testimony, no less than 15 calendar days prior to any such hearing. Except in extraordinary circumstances, no evidence may be introduced or witness called in an adjudicatory hearing unless the respondent has been afforded a prior opportunity to review such evidence or has been provided the name of the witness.

(2) After a witness has testified on direct examination at an adjudicatory hearing, the Committee, at the request of the respondent, shall make available to the respondent any statement of the witness in the possession of the Committee which relates to the subject matter as to which the witness has testified.

(3) Any other testimony, statement, or documentary evidence in the possession of the Committee which is material to the respondent's defense shall, upon request, be made available to the respondent.

(g) No less than five days prior to the hearing, the respondent or counsel shall provide the adjudicatory subcommittee with the names of witnesses expected to be called, summaries of their expected testimony, and copies of any documents or other evidence proposed to be introduced.

(h) The respondent or counsel may apply to the subcommittee for the issuance of subpoenas for the appearance of witnesses or the production of evidence. The application shall be granted upon a showing by the respondent that the proposed testimony or evidence is relevant and not otherwise available to respondent. The application may be denied if not made at a reasonable time or if the testimony or evidence would be merely cumulative.

(i) During the hearing, the procedures regarding the admissibility of evidence and rulings shall be as follows:

(1) Any relevant evidence shall be admissible unless the evidence is privileged under the precedents of the House of Representatives.

(2) The Chairman of the subcommittee or other presiding member at an adjudicatory subcommittee hearing shall rule upon any question of admissibility or pertinency of evidence, motion, procedure, or any other matter, and may direct any witness to answer any question under penalty of contempt. A witness, witness's counsel, or a member of the subcommittee may appeal any ruling to the members present at that proceeding. The majority vote of the members present at such proceeding on such an appeal shall govern the

question of admissibility and no appeal shall lie to the Committee.

(3) Whenever a witness is deemed by a Chairman or other presiding member to be in contempt of the subcommittee, the matter may be referred to the Committee to determine whether to refer the matter to the House of Representatives for consideration.

(4) Committee counsel may, subject to subcommittee approval, enter into stipulations with the respondent and/or the respondent's counsel as to facts that are not in dispute.

(j) Unless otherwise provided, the order of an adjudicatory hearing shall be as follows:

(1) The Chairman of the subcommittee shall open the hearing by stating the adjudicatory subcommittee's authority to conduct the hearing and the purpose of the hearing.

(2) The Chairman shall then recognize Committee counsel and the respondent's counsel, in turn, for the purpose of giving opening statements.

(3) Testimony from witnesses and other pertinent evidence shall be received in the following order whenever possible:

(i) witnesses (deposition transcripts and affidavits obtained during the inquiry may be used in lieu of live witnesses if the witness is unavailable) and other evidence offered by the Committee counsel,

(ii) witnesses and other evidence offered by the respondent,

(iii) rebuttal witnesses, as permitted by the Chairman.

(4) Witnesses at a hearing shall be examined first by counsel calling such witness. The opposing counsel may then cross-examine the witness. Redirect examination and recross examination by counsel may be permitted at the Chairman's discretion. Subcommittee members may then question witnesses. Unless otherwise directed by the Chairman, questions by Subcommittee members shall be conducted under the five-minute rule.

(5) The Chairman shall then recognize Committee counsel and respondent's counsel, in turn, for the purpose of giving closing arguments. Committee counsel may reserve time for rebuttal argument, as permitted by the Chairman.

(k) A subpoena to a witness to appear at a hearing shall be served sufficiently in advance of that witness' scheduled appearance to allow the witness a reasonable period of time, as determined by the Chairman of the adjudicatory subcommittee, to prepare for the hearing and to employ counsel.

(l) Each witness appearing before the subcommittee shall be furnished a printed copy of the Committee rules, the pertinent provisions of the Rules of the House of Representatives applicable to the rights of witnesses, and a copy of the Statement of Alleged Violation.

(m) Testimony of all witnesses shall be taken under oath or affirmation. The form of the oath or affirmation shall be: "Do you solemnly swear (or affirm) that the testimony you will give before this subcommittee in the matter now under consideration will be the truth, the whole truth, and nothing but the truth (so help you God)?" The oath or affirmation shall be administered by the Chairman or Committee member designated by the Chairman to administer oaths.

(n) At an adjudicatory hearing, the burden of proof rests on Committee counsel to establish the facts alleged in the Statement of Alleged Violation by clear and convincing evidence. However, Committee counsel need not present any evidence regarding any count that is admitted by the respondent or any fact stipulated.

(o) As soon as practicable after all testimony and evidence have been presented, the subcommittee shall consider each count contained in the Statement of Alleged Violation and shall determine by a majority vote of its members whether each count has been proved. If a majority of the subcommittee does not vote that a count has been proved, a motion to reconsider that vote may be made only by a member who voted that the count was not proved. A count that is not proved shall be considered as dismissed by the subcommittee.

(p) The findings of the adjudicatory subcommittee shall be reported to the Committee.

Rule 24. Sanction Hearing and Consideration of Sanctions or Other Recommendations

(a) If no count in a Statement of Alleged Violation is proved, the Committee shall prepare a report to the House of Representatives, based upon the report of the adjudicatory subcommittee.

(b) If an adjudicatory subcommittee completes an adjudicatory hearing pursuant to Rule 23 and reports that any count of the Statement of Alleged Violation has been proved, a hearing before the Committee shall be held to receive oral and/or written submissions by counsel for the Committee and counsel for the respondent as to the sanction the Committee should recommend to the House of Representatives with respect to such violations. Testimony by witnesses shall not be heard except by written request and vote of a majority of the Committee.

(c) Upon completion of any proceeding held pursuant to clause (b), the Committee shall consider and vote on a motion to recommend to the House of Representatives that the House take disciplinary action. If a majority of the Committee does not vote in favor of the recommendation that the House of Representatives take action, a motion to reconsider that vote may be made only by a member who voted against the recommendation. The Committee may also, by majority vote, adopt a motion to issue a Letter of Reproval or take other appropriate Committee action.

(d) If the Committee determines a Letter of Reproval constitutes sufficient action, the Committee shall include any such letter as a part of its report to the House of Representatives.

(e) With respect to any proved counts against a Member of the House of Representatives, the Committee may recommend to the House one or more of the following sanctions:

(1) Expulsion from the House of Representatives.

(2) Censure.

(3) Reprimand.

(4) Fine.

(5) Denial or limitation of any right, power, privilege, or immunity of the Member if

under the Constitution the House of Representatives may impose such denial or limitation.

(6) Any other sanction determined by the Committee to be appropriate.

(f) With respect to any proved counts against an officer or employee of the House of Representatives, the Committee may recommend to the House one or more of the following sanctions:

(1) Dismissal from employment.

(2) Reprimand.

(3) Fine.

(4) Any other sanction determined by the Committee to be appropriate.

(g) With respect to the sanctions that the Committee may recommend, reprimand is appropriate for serious violations, censure is appropriate for more serious violations, and expulsion of a Member or dismissal of an officer or employee is appropriate for the most serious violations. A recommendation of a fine is appropriate in a case in which it is likely that the violation was committed to secure a personal financial benefit; and a recommendation of a denial or limitation of a right, power, privilege, or immunity of a Member is appropriate when the violation bears upon the exercise or holding of such right, power, privilege, or immunity. This clause sets forth general guidelines and does not limit the authority of the Committee to recommend other sanctions.

(h) The Committee report shall contain an appropriate statement of the evidence supporting the Committee's findings and a statement of the Committee's reasons for the recommended sanction.

Rule 25. Disclosure of Exculpatory Information to Respondent

If the Committee, or any investigative or adjudicatory subcommittee at any time receives any exculpatory information respecting a Complaint or Statement of Alleged Violation concerning a Member, officer, or employee of the House of Representatives, it shall make such information known and available to the Member, officer, or employee as soon as practicable, but in no event later than the transmittal of evidence supporting a proposed Statement of Alleged Violation pursuant to Rule 26(c). If an investigative subcommittee does not adopt a Statement of Alleged Violation, it shall identify any exculpatory information in its possession at the conclusion of its inquiry and shall include such information, if any, in the subcommittee's final report to the Committee regarding its inquiry. For purposes of this rule, exculpatory evidence shall be any evidence or information that is substantially favorable to the respondent with respect to the allegations or charges before an investigative or adjudicatory subcommittee.

Rule 26. Rights of Respondents and Witnesses

(a) A respondent shall be informed of the right to be represented by counsel, to be provided at his or her own expense.

(b) A respondent may seek to waive any procedural rights or steps in the disciplinary process. A request for waiver must be in writing, signed by the respondent, and must detail what procedural steps the respondent seeks to waive. Any such request shall be subject to the acceptance of the Committee or subcommittee, as appropriate.

(c) Not less than 10 calendar days before a scheduled vote by an investigative subcommittee on a Statement of Alleged Violation, the subcommittee shall provide the respondent with a copy of the Statement of Alleged Violation it intends to adopt together with all evidence it intends to use to prove those charges which it intends to adopt, including documentary evidence, witness testimony, memoranda of witness interviews, and physical evidence, unless the subcommittee by an affirmative vote of a majority of its members decides to withhold certain evidence in order to protect a witness, but if such evidence is withheld, the subcommittee shall inform the respondent that evidence is being withheld and of the count to which such evidence relates.

(d) Neither the respondent nor his counsel shall, directly or indirectly, contact the subcommittee or any member thereof during the period of time set forth in paragraph (c) except for the sole purpose of settlement discussions where counsels for the respondent and the subcommittee are present.

(e) If, at any time after the issuance of a Statement of Alleged Violation, the Committee or any subcommittee thereof determines that it intends to use evidence not provided to a respondent under paragraph (c) to prove the charges contained in the Statement of Alleged Violation (or any amendment thereof), such evidence shall be made immediately available to the respondent, and it may be used in any further proceeding under the Committee's rules.

(f) Evidence provided pursuant to paragraph (c) or (e) shall be made available to the respondent and his or her counsel only after each agrees, in writing, that no document, information, or other materials obtained pursuant to that paragraph shall be made public until–

(1) such time as a Statement of Alleged Violation is made public by the Committee if the respondent has waived the adjudicatory hearing; or

(2) the commencement of an adjudicatory hearing if the respondent has not waived an adjudicatory hearing; but the failure of respondent and his counsel to so agree in writing,

and therefore not receive the evidence, shall not preclude the issuance of a Statement of Alleged Violation at the end of the period referenced to in (c).

(g) A respondent shall receive written notice whenever-

(1) the Chairman and Ranking Minority Member determine that information the Committee has received constitutes a complaint;

(2) a complaint or allegation is transmitted to an investigative subcommittee;

(3) that subcommittee votes to authorize its first subpoena or to take testimony under oath, whichever occurs first; and

(4) the Committee votes to expand the scope of the inquiry of an investigative subcommittee.

(h) Whenever an investigative subcommittee adopts a Statement of Alleged Violation and a respondent enters into an agreement with that subcommittee to settle a complaint on which the Statement is based, that agreement, unless the respondent requests otherwise, shall be in writing and signed by the respondent and the respondent's counsel, the Chairman and Ranking Minority Member of the subcommittee, and the outside counsel, if any.

(i) Statements or information derived solely from a respondent or his counsel during any settlement discussions between the Committee or a subcommittee thereof and the respondent shall not be included in any report of the subcommittee or the Committee or otherwise publicly disclosed without the consent of the respondent.

(j) Whenever a motion to establish an investigative subcommittee does not prevail, the Committee shall promptly send a letter to the respondent informing him of such vote.

(k) Witnesses shall be afforded a reasonable period of time, as determined by the Committee or subcommittee, to prepare for an appearance before an investigative subcommittee or for an adjudicatory hearing and to obtain counsel.

(l) Prior to their testimony, witnesses shall be furnished a printed copy of the Committee's Rules of Procedure and the provisions of the Rules of the House of Representatives applicable to the rights of witnesses.

(m) Witnesses may be accompanied by their own counsel for the purpose of advising them concerning their constitutional rights. The Chairman may punish breaches of order and decorum, and of professional responsibility on the part of counsel, by censure and exclusion from the hearings; and the Committee may cite the offender to the House of Representatives for contempt.

(n) Each witness subpoenaed to provide testimony or other evidence shall be provided the same per diem rate as established, authorized, and regulated by the Committee on House Administration for Members, officers and employees of the House, and as the Chairman considers appropriate, actual expenses of travel to or from the place of examination. No compensation shall be authorized for attorney's fees or for a witness' lost earnings. Such per diem may not be paid if a witness had been summoned at the place of examination.

(o) With the approval of the Committee, a witness, upon request, may be provided with a transcript of his or her deposition or other testimony taken in executive session, or, with the approval of the Chairman and Ranking Minority Member, may be permitted to examine such transcript in the office of the Committee. Any such request shall be in writing and shall include a statement that the witness, and counsel, agree to maintain the confidentiality of all executive session proceedings covered by such transcript.

Rule 27. Frivolous Filings

If a complaint or information offered as a complaint is deemed frivolous by an affirmative vote of a majority of the members of the Committee, the Committee may take such action as it, by an affirmative vote of its members, deems appropriate in the circumstances.

Rule 28. Referrals to Federal or State Authorities

Referrals made under clause 3(a)(3) of Rule XI of the Rules of the House of Representatives may be made by an affirmative vote of two-thirds of the members of the Committee.

APPENDIX H

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,	CASE NO. 4:01CR00207
PLAINTIFF	JUDGE LESLEY WELLS

vs.

JAMES TRAFICANT

DEFENDANT

MOTION OF DEFENDANT JAMES A. TRAFICANT, JR. TO BAR SENTENCING

Defendant James A. Traficant, Jr., hereby moves this Court for an Order barring any additional sentencing based upon the Double Jeopardy Clause of the 5th Amendment to the United States Constitution, as the United States has already imposed punishment on Mr. Traficant under its authority in Article I, Section 5 of the United States Constitution. A memorandum in support is attached hereto.

Respectfully Submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

This is a case of first impression. Only once in the history of this great nation has a sitting member of the U.S. House of Representatives (the "House") been punished by expulsion from the House after an adjudication of guilt by a jury, but before sentence has been imposed upon the member. See, United States v. Mvers 635 F.2d 932 (2d Cir. 1980). Although the Myers case involved a member of congress that was expelled following conviction by a jury but prior to sentencing, it does not appear that Mr. Myers raised the double jeopardy clause's bar to successive punishments for the same offenses that Mr. Traficant raises here. Accordingly, there is no judicial precedent that directly determines the issue raised by this motion. Despite the lack of direct controlling authority, the sequence of actions by the United States in this case, renders it blatantly unconstitutional, by reason of double jeopardy, for additional punishment to be imposed upon Mr. Traficant. The following discussion supports this assertion.

On April 11, 2002, a jury found Mr. Traficant guilty of 10 counts of the superseding indictment in this Case No. 4:01 CR 207. Almost immediately thereafter, the United States House of Representatives Committee on Standards of Official Conduct (the "Ethics Committee") began its own criminal proceedings against Mr. Traficant.[1] The Ethics Committee proceeded in a bifurcated fashion. First, the Investigatory Subcommittee investigated Mr. Traficant's actions. This investigation was exclusively comprised of the wholesale adoption of the trial transcript in case No. 4:01CR207. The Subcommittee then prepared a Statement of Alleged Violations on 10 counts, which consisted of the same counts within this Court's superseding indictment. Next, the Ethics Committee's Adjudicatory Subcommittee conducted investigatory hearings in relation to Mr. Traficant. On July 17, 2002, the Adjudicatory Subcommittee found Mr. Traficant guilty on 9 of the 10 counts in the superseding indictment.

The full Ethics Committee then met to determine an appropriate punishment for Mr. Traficant based upon the Subcommittee's guilty verdict, and recommended that Mr. Traficant be expelled from the U.S. House of Representatives. In this connection, *US House Resolution 495* was formulated as follows:

> H. Res. 495
>
> *Resolved,* That, pursuant to Article I, Section 5, Clause 2 of the United States Constitution, Representative James A. Traficant, Jr., be, and he hereby is, expelled from the House of Representatives.

Mr. Traficant, on several occasions, requested that the members of the House postpone their scheduled July 24 vote on expulsion until after this Court sentenced him on July 30. On July 24, 2002, Representative Steven LaTourette, a former U.S. Attorney, on the House Floor, moved that the House postpone its vote on the proposed resolution to expel

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[1] The constitution provides in Article I, §5: "Each House may ...punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member, (emphasis added).

Mr. Traficant until September 4, after this Court imposed sentence. Although 146 Members joined Mr. LaTourette, the House rejected Mr. LaTourette's motion and proceeded with a vote on expulsion. Under Article I, Section 5, the decision of the House to impose punitive sanctions against Mr. Traficant in advance of sentencing by this Court, bars additional punishment being imposed now.

The expulsion power of Congress derives from an explicit textual commitment within the Constitution authorizing Congress to punish its members. Specifically, Article I, Section 5 of the United States Constitution provides, in pertinent part:

> Each House may determine the Rules of its Proceedings, *punish* its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member, (emphasis added).

The Constitution also provides that:

> No person shall be held to answer for a capital, or otherwise infamous crime unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; *nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb:* nor shall

> be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation, (emphasis added).

Fifth Amendment, U.S. Constitution.

It is the interaction of these two Constitutional mandates that precludes the imposition of successive punishments on Mr. Traficant for the same conduct.

II. DOUBLE JEOPARDY:

The United States Supreme Court has addressed the issue of double jeopardy, and has enumerated a standard that reduces to the following inquiry: is the subsequent action a civil, remedial action to protect the Government from financial loss; or is it intended to authorize criminal punishment to vindicate public justice. *United States v. Hess.* 317 U.S. 573, 548-49 (1943). Only the latter subjects a defendant to "jeopardy" within the constitutional meaning. *Id.*

The double jeopardy clause prohibits punishing twice, or attempting a second time to punish criminally, for the same offense. *Id.* at 549 (internal citations omitted).

> [5] As we have observed, the risk to which the term jeopardy refers is that traditionally associated with 'actions intended to authorize criminal punishment to vindicate public justice." United States ex rel. Marcus v. Hess, supra, 317 U.S. at 548—549, 63 S.Ct. at 388. Because of its purpose and potential consequences, and the nature and resources of the State, *530 such a proceeding imposes heavy pressures and burdens—psychological, physical, and financial—on a person charged. The purpose of the Double Jeopardy Clause is to require that he be subject to the experience only once "for the same offence.' See Green v. United States, 355 U.S. 184, 187, 78 S.Ct. 221, 223, 2 L.Ed.2d 199 (1957); Price v. Georgia, 398 U.S., at 331, 90 S.Ct. at 1792; United States v. Jorn, 400 U.S. 470, 479, 91 S.Ct. 547, 554, 27 L.Ed.2d 543 (1971) (opinion of Harlan, Jr.).

Breed v. Jones, 421 U.S. 519, 529 (1975). (emphasis added).

Clearly, double jeopardy protection prohibits the Government from punishing a defendant more than once for the same offenses. The plain text of the U.S. Constitution grants the U.S. House of Representatives, a coordinate branch of the Government, the express authority to punish its members. The Constitution does not state however that punished members may be subjected to successive punishment of law for the same conduct.

The House has several options available in terms of punishment. The House may expel, censure, reprimand, fine, deny or limit any right, power, privilege or immunity of the Member, or *__any other sanction__* determined by the Committee to be appropriate. __See__ Ethics Committee Rule 25(e)(1)-(6), adopted March 14, 2001, 107th Congress. The Government has express Constitutional and House Rule authority to determine the appropriate punishment resulting from a member's misconduct. This jurisdiction is concurrent with that of a court over a member for alleged violation of criminal law.

In this instance, it is clear that Mr. Traficant has been subjected to two criminal proceedings. In point of fact, this Court's superseding indictment (the "Indictment") and the Statement of Alleged Violations (the "SOV") are practically identical. Moreover, the procedure employed by the House in the prosecution of Mr. Traficant was tantamount to a criminal investigatory hearing. The history of expulsion and the goals of the double jeopardy clause coalesce here to render additional punishment at law improper.

III. HISTORICAL BACKGROUND OF EXPULSION POWER:

Mr. Traficant's double jeopardy motion here is grounded in the historical constitutional framework from which the expulsion power of Congress is derived.

"It would appear that the delegates to the Constitutional Convention assumed a general understanding of the nature and scope of the expulsion power drawn from the practices of English Parliament." Article I, Section 5: Congress' Power to Expel - An Exercise in Self-Restraint, 29 Syracuse Law Review 1071, 1072. "The House of Commons had the exclusive right to control its own proceedings, including the power to discipline its members. . . A standard remedy, arising from Parliament's ancient role as a Court of justice, was commitment." Id. at 1073 (emphasis added).

> [TJhe scope of Parliament's power to expel its members was not confined by statute or rule, and its practices suggest that Parliament in fact recognized no substantive limits on that power. The enormous variety of misconduct—criminal and civil, official, personal and political—which was punished by Parliament demonstrates an inherent and absolute discretion to determine what misconduct presented a sufficient threat to its integrity or to its proper functioning to warrant removal of a member from office.

Id. at 1083.

As it relates to the American equivalent of Parliament, Congress

> It appears, then that the Framers accepted the traditional assumption of Parliament and the colonial legislatures that a legislature's inherent power to expel its own is wholly discretionary and that the determination of what conduct justifies imposition of this severe sanction is to be made by the legislature itself.

Id-at 1090.

It has been generally accepted from the beginning of the Republic that "There [is] no restriction on the [expulsion] power expressed [in the constitution] and no specification of the grounds on which expulsion must be based. . . expulsion [is] in the nature of a judicial action and criminal misconduct, although not necessarily constituting a statutory crime, must be proven." Id. at 1095 citing Cong. Globe, 37th Cong., 2nd Sess. 648 (1862). (Emphasis added).

Expulsion proceedings are among the constitutionally enumerated instances when. . . Congress sits in judgment and functions as a Court.

> Article II, § 4, provides that '[t]he President, Vice-President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.' Members of Congress are not 'civil officers' for purposes of impeachment. But although Senators and Representatives thus cannot be impeached, they can be removed from office. Article I, § 5 provides: 'Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members. . . . Each House may . . . punish its members for disorderly behavior, and, with the concurrence of two thirds, expel a member.
>
> Tribe. American Constitutional Law § 4-17 at 290.

Although these provisions make it clear that Congress, like its English counterpart, has the authority to sit in judgment and function as a court, the Constitution only makes express mention of the appropriateness of successive prosecution in connection with cases of impeachment, not expulsion. Specifically,

> Article 1, §3, cl. 7. limits the effect of impeachment and conviction by providing that 'Judgment in cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of Honor, Trust or Profit under the United States: but the party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law." Such criminal liability is absolute; Congress cannot eliminate it by a grant of immunity, nor the President by an exercise of the pardon power.

Id. at 297 citing U.S. Const., Art. II, §2, cl.1. (gives the President the "power to grant…pardons…except in cases of impeachment.)

There is no corresponding language either in the Constitution or in any judicial precedent which states that when Congress has exercised its punitive authority to expel, that the party convicted is nevertheless liable and subject to subsequent punishment. This omission suggests that it was not intended that once Congress punishes by expulsion, that subsequent prosecution is appropriate. The Constitution makes specific mention of impeachment as a political process only. By contrast expulsion is a judicial act with Congress acting as a court.

The severity of the expulsion sanction and its punitive nature were viewed historically as a basis to immunize Congressmen from prosecution. See United Stats v. Johnson, 337 F/2d. 180 (4rth Cir. 1964). The court reasoned that a Congressman guilty of accepting a bribe should not be prosecuted, inter alia, by reason of the "availability of legislative sanctions by which Congress is able to punish its own members), See, "The Bribed Congressman's Immunity from Prosecution" 75 Yale L.J. 335, 336.

Although the American Congress is but a coordinate branch of government, without the absolute supremacy of the English Parliament, particularly as reflected by its traditions as the Highest Court of the Realm," the dualism that enables Congress to cite for contempt and compel witnesses to appear before it is ample evidence that it may operate nonetheless as a Court in certain prescribed instances.

For example:

> In *Senate Select Comm.* v. *Nixon* (II), 370 F.Supp. 521 (D.D.C. 1974) (it was determined that a congressional subpoena of information from the President, issued in the context of an investigation of apparently criminal acts, *is as justifiable as a subpoena issued in judicial proceedings,* affd 498 F.2d 725 (D.C.Cir. 1974). (emphasis added).

It is clear from these historical precedents that an expulsion proceeding is essentially criminal in character. The experience of Mr. Traficant here bears this out. Mr. Traficant was presented with a statement of alleged violations, tantamount to an indictment, and subjected to a three month congressionally mandated legal process that approximated a criminal trial.

Ultimately he was confronted by the entire U.S. House of Representatives, his peers, where a vote was taken concerning his expulsion.

Expulsion is clearly "an action intended to authorize criminal punishment to vindicate public justice." Breed at 529. A person is only required to be subjected to this experience once for the same offense.

The decision of Congress to proceed to expel Mr. Traficant in advance of sentencing now precludes the same sovereign from imposing a second sentence.

Mr. Traficant's case constitutes the first time that a court has been confronted with this issue, however, the authorities that establish the framework for resolution of double jeopardy questions compel the conclusion that it is unconstitutional to subject him to a second round of sanctions. Accordingly, Mr. Traficant should be discharged.

Based upon the foregoing, Mr. Traficant respectfully requests that the Court grant this Motion.

Respectfully submitted,

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